Chapter 4
Enforcing Contractual Obligations

Learning Objectives

LO 1 Identify the various mistakes that can end or otherwise affect a contract
LO 2 Describe and contrast the different forms of misrepresentation
LO 3 Explain the effects of duress and undue influence on a contract
LO 4 Consider the implications of privity and assignment for a contract
LO 5 Explain the difference between assignment and negotiation of a negotiable instrument
LO 6 List the events that can bring a contract to an end
LO 7 Describe how a contract can be breached or otherwise ended
LO 8 Summarize what constitutes a frustrating event and its effect on a contract
LO 9 Outline the remedies that are available for breach of contract
LO 10 Explain what is meant by damages and any limitation on their availability
LO 11 Compare equitable remedies to other remedies available for breach of contract
At the heart of most business dealings is the understanding that in the event of a dispute, the courts will enforce the contractual agreement. When both parties are happy with the outcome, it is not necessary that the contract be legally enforceable. It's only when the parties think the agreement is not being honoured that the legal validity of such arrangements and their enforceability in court becomes an important issue. Those disputes can revolve around the existence of the contract, complaints about the conduct of the parties at the time of agreement, or the performance of the obligations arising from it. The prior chapter dealt with what was needed for a legally enforceable contract to exist. This chapter looks at disputes that arise with respect to the start of the contractual relationship, including mistakes as to the nature, terms, or other aspects of the agreement; misrepresentation; duress; and undue influence. The concept of privity and the assignment of contractual obligations are examined. The chapter concludes by examining problems related to the proper performance of the terms of the agreement.

LO 1 MISTAKE

One of the most effective ways of reducing risk in business transactions is to exercise great care to ensure that the parties being dealt with are honourable, reliable, and solvent. Of equal importance is to ensure that there is complete and accurate documentation of all aspects of that transaction. The actual contract is, of course, of utmost importance, and extreme care should be taken over the choice of words and phrases used in the resulting document. Not only is it important to ensure that there is no ambiguity in those words and phrases, and that they say what is intended, but also great care should be taken to ensure that the document is complete, with all eventualities anticipated and provided for. Still, disputes will arise. Often costs can be considerably reduced by including provisions for all disputes to be handled through mediation and arbitration. When contracts are challenged, the argument often revolves around the interpretation of particular terms. Often the parties have a different understanding of the wording or effect of the terms of an agreement. Such mistakes can take place in three ways (see Figure 4.1). Note that the term, mistake, as it is used here refers to an error with respect to the actual terms or effect of the agreement itself, and not simply an error in judgment with respect to the outcome. You may have made a mistake buying certain shares in a company when they go down in price rather than up, but that has nothing to do with the actual contract of purchase. You simply misjudged the market.

The first type of mistake occurs when only one of the parties is in error. Such one-sided mistakes (often referred to as unilateral mistakes) will normally not affect the existence of the contract, unless the mistake is obvious to the other party. This is where the principle of caveat emptor (let the buyer beware) is applied. When one party has been
induced to make the mistake by misleading statements made by the other, this is an actionable misrepresentation, as discussed below. But when that person misleads himself or herself, normally he or she has no recourse. On rare occasions a person might sign a document by mistake, thinking it is about something different than it actually is. If that mistake is so profound that it goes to the nature of the agreement in its entirety, not just some aspect of it such as the price, the document may be void. The principle is non est factum (it is not my act), and while it used to be very important, the Supreme Court of Canada has now determined that negligence may block such a claim.\footnote{Marvco Colour Research Ltd. v. Harris, [1982] 2 SCR 774.} The problem is that it is difficult to make an error about the essential nature of a document, for example, mistaking a mortgage for a guarantee, unless you haven’t read it—and not reading it qualifies as negligence that may block the claim. Today such a claim would likely be restricted to someone who couldn’t read the document because of illiteracy, unfamiliarity with the language, blindness, or a mental disability.

When both parties have made the same serious error, the resulting shared mistake (often referred to as common mistake) may destroy consensus and result in no contract between them. The contract is said to be void in such circumstances. For example, where both parties think they are dealing with one parcel of land when in fact they are dealing with another, or where both parties share a belief that an event has taken place when it hasn’t, or even when both believe a particular law or regulation applies to the situation and it doesn’t, the contract may be void. If this kind of shared misapprehension is not the fault of one of the parties and is serious enough to actually destroy the basis of the agreement, it can cause the contract to be void for lack of consensus. Such shared mistakes are rare. Sometimes, when a mistake is made in recording the agreement, the courts will respond to a request to rectify the document so that it corresponds to the original understanding between the parties. But for rectification to take place, the actual terms of the agreement must be clearly understood by both parties at the time of contract and the error must be simply in the recording of that agreement. Thus, if the parties agreed to sell and purchase a boat for $50,000, and it was mistakenly written down as $5000, the court may be willing to supply the missing zero.

The third type of mistake occurs when both parties have a different understanding of the terms of a contract. Such misunderstandings (often referred to as mutual mistakes) are the most common disputes in contract litigation and are usually resolved by the court imposing the most reasonable interpretation of those terms on the parties. For example, if I thought the terms of the contract required that you include the sheepskin seat covers with the sale of your car, and you refused to supply them, the court would look at the terms of the contract and the surrounding circumstances to determine whether they were included. The court would determine the most reasonable interpretation of the terms. If the car was originally shown to me with the seat covers on, it is likely they would be included. It is only when the court finds both interpretations equally reasonable that the mistake will destroy the contract. Thus, two British merchants who agreed on the sale and purchase of the cargo of the ship Peerless, on route from Bombay, India, to Liverpool, England, ran into difficulty when it was discovered that there were two ships of that name making that passage but at different times. The purchaser intended the cargo to be sent on one ship and the seller intended it to be sent on the other. Both positions were equally reasonable; consequently, the court found that there was no contract.\footnote{Raffles v. Wichelhaus (1894), 2 H. & C. 906, 159 E.R. 375 (E.D.).}
Contract Interpretation

As explained above, when there is a disagreement over the meaning of a term used in a contract, the normal approach taken by the courts is to apply the most reasonable interpretation. Remember that the preference of the court is to give effect to the reasonable expectations of the parties to the agreement. If the term is clear and there is no ambiguity, the court simply applies the literal meaning of the term. In determining that meaning, the courts will often look not only to dictionaries but also, more importantly, to the common usage of the industry involved.

Where there is ambiguity, the courts will look to the rest of the document to try to discern the intention of the parties. In some circumstances they will also look to other dealings between the parties, but the **parol evidence rule** requires that where the terms of the agreement are clear and unambiguous, no outside extrinsic evidence will be considered that contradicts those clear terms. But there are some exceptions. Evidence of fraud, duress, or of a subsequent agreement ending or changing the contract in question will all give reason to abandon the operation of the rule. Even evidence that the written document was not intended to embody all of the terms of the agreement will support the introduction of extrinsic evidence.

It must also be noted that in some instances the courts will imply terms into the agreement that the parties have left out. The practice is to include such a term where it is clear that the parties would have done so had they thought of it. But the courts will not renegotiate the contract for the parties. Nor will they supply missing terms that are necessary for a contract to exist. If the parties have neglected to state a price, the courts will normally not supply it for them. However, if the parties have not stated when the price is to be paid the court will normally imply into the agreement that the price is to be paid upon performance or within a reasonable time, depending on the nature of the agreement. Some statutes also imply terms into contracts. The whole purpose of **Sale of Goods Act** discussed in the following chapter is to supply such missing terms when goods are being sold.

Case Summary 4.1 **Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.**

Written Contract Corrected by Rectification

Performance Industries (Appellant/Defendant) and Sylvan (Respondent/Plaintiff) in this appeal before the Supreme Court of Canada.

Sylvan (owned by Bell) operated an 18-hole golf course and entered into a joint venture agreement with Performance (owned by O’Conner) to exercise an option held by Sylvan for the purchase of additional land. The joint venture agreement contemplated a residential housing development around a cul-de-sac along the 18-hole fairway. Both parties agreed that a width of 110 yards was needed to accommodate a double row of houses. However, when the oral agreement was put into writing, the length was correct at 480 yards but the width was written as 110 feet instead of 110 yards. When Performance decided to start the development Sylvan insisted on the written terms, claiming they were an accurate representation of the oral agreement. The case went all the way to the Supreme Court of Canada, which found that the oral agreement was for 110 yards, not feet, and Sylvan (O’Conner) knew it. There were many other sources and witnesses that determined the 110 yard finding. In addition to finding O’Conner, the principal of Sylvan, had

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2002 SCC 19 (CanLII).
committed a fraudulent misrepresentation, the court also found that this was an appropriate situation to rectify the written contract and changed the 110 feet to read 110 yards, as the parties had originally intended.

The case is helpful in that it shows the operation of the equitable remedy of rectification at the highest level. It was argued that Performance should not be awarded an equitable remedy because it had failed to exercise due diligence. The Court found that due diligence was not a prerequisite to obtain a remedy of rectification and that, in any case, Mr. O’Conner was in no position to claim such a failure because of his own fraud. At the trial level damages were awarded for breach of the rectified contract based on loss of profits and $200,000 in punitive damages. The punitive damage award was overturned. Only in exceptional cases will punitive damages be awarded, and this one didn’t qualify.

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**Exemption Clauses**

As mentioned in Chapter 3, area where disputed contract terms often arise is over exemption clauses, sometimes referred to as exculpatory, exclusion, or limitation clauses. These are provisions that favour one side, usually exempting or limiting the liability of that side for failure to perform some aspect of the contract. It is important to understand that the courts base their approach to all such terms on the principle of freedom of contract. The parties are free to agree to whatever they want, and once they have done so they are bound by the terms. The courts are generally reluctant to interfere with such terms, even when they may appear unfair, because the benefits and obligations agreed to by the parties to a large extent will have been calculated on the basis of the risks each faces, and such risk-reducing clauses are very important in that calculation. Still, when the courts do apply such clauses, they usually do so very narrowly. Any ambiguity will be interpreted at the expense of the party favoured by the clause. If a hotel has a sign saying that it is “not responsible for lost or stolen goods,” and those goods were destroyed by fire, the hotel would not be protected. It is vital, then, for the parties to take great care in composing such a clause. It must be clear, cover only the situations intended, and be capable of no other interpretation.

Exemption clauses must be brought to the attention of the other contracting party. Today it is generally accepted that any unusual clause like this should be highlighted in some way and not buried in the general language of the contract. The language used should be concise and easily understood and be capable of no other interpretation. Where possible it is wise to have the other contracting party initial the clause. If the notification is by sign, as would likely be the case in a parking lot or restaurant, that sign must be at a location where it is clearly visible to the customer.

**Standard-form contracts** usually contain such exemption clauses. Contract law is based on a bargaining model, but, in fact, parties are often in unequal bargaining positions. Try bargaining with an airline over the terms included in a ticket or a car dealer over the terms included in the warranty. In those circumstances the courts are particularly vigilant in interpreting such exemption clauses as narrowly as possible.

The Supreme Court has made it clear that the parties to a contract are free to contract out of even fundamental obligations. Still, especially in consumer transactions, the court will generally exercise their discretion to interpret the words used very narrowly in favour of the consumer. To overrule such a clause, whether in commercial or consumer transactions, the courts will first look at the construction of the contract to determine

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whether the wording of the clause catches the situation or whether terms should be implied into the contract. As in the example above, if the clause refers only to “lost or stolen goods,” and the goods are destroyed in a fire, the clause will not be broad enough to cover the situation. Sometimes, however, the courts will find a duty of good faith overriding even a clearly worded exemption clause. Second, the courts will determine whether the clause is valid in terms of there being no undue influence, or whether both parties were in equal bargaining positions at the time of the creation of the contract (see discussion below). And finally, the courts will consider whether there is some misconduct, such as fraud or criminality on the part of the person seeking to hide behind the exemption clause, or whether that exemption clause should be ignored because of other public policy considerations.

Case Summary 4.2 Boutcev v. DHL International Express Ltd.\(^5\)

**Exclusion Clause Not Properly Brought to the Attention of Customer**

Boutcev (Plaintiff), DHL International Express Ltd. (Defendant) in a trial before the Alberta Court of Queen’s Bench. When two boxes that were supposed to contain computers arrived empty at their destination, the plaintiff, Boutcev, sued the shipper, DHL International Express Ltd., for compensation. The shipper refused to pay and denied all liability, referring to an exemption clause contained in very small print on the back of the waybill. The judge found that the clause was illegible, saying it was “painfully small and defied reading with the naked eye.” He refused to enforce it, holding in favour of the plaintiff. Parties to an agreement are only bound by the terms that are reasonably brought to their attention, and to ensure that such exclusion clauses are enforceable, the party drawing up the contract should put them in bold type or otherwise highlight them in some way.

LO 2 MISREPRESENTATION

Misrepresentation involves false and misleading statements that induce a person to enter into a contract. Note that the term false includes half-truths, where what is not mentioned makes the statement misleading. Telling a prospective investor that a finance company has several million dollars in assets in the form of outstanding loans is misleading if the investor is not also told that half of those loans are unsecured and unrecoverable. The matter is simplified if the false statement becomes a term of the contract and, consequently, the injured party can sue for breach of contract. Breach of contract will be discussed as a separate topic below. Often, however, these misleading statements never become part of the contract, even though they are persuasive and the very reason the person enters into the agreement in the first place. If you purchase property because the vendor told you that a new resort is being built nearby, the purchase agreement would normally make no reference to the new resort. Still, if you relied on that false information

to persuade you to purchase the property, you would likely have recourse under the law of misrepresentation.

For a statement to be an actionable misrepresentation, normally it must be a statement of fact, not a statement of opinion or a prediction of some future event. You are entitled to have the opinion that you are selling a “great little car in good shape.” It is only when an expert makes the statement that the opinion can be an actionable misrepresentation. When a mechanic says the car he is selling is a “great little car in good shape,” the statement had better be true. But in most cases the false statement must be a statement of fact to be an actionable misrepresentation. Even the non-expert will be liable if he falsely claims as a fact that the engine of the car he is selling has recently been rebuilt or replaced. When marketing products or services, legislated advertising standards must be followed. Even when those standards are adhered to, if the message is false or misleading, individual customers may be able to sue for misrepresentation. Consumer protection legislation, which is in place in all jurisdictions, broadens the responsibility of employers for misleading statements made by their salespeople. Even when the contract declares that there are no other representations express or implied outside of that contract, consumer protection legislation will usually still hold the seller liable for such misleading statements. Consumer protection legislation will also be discussed under “Consumer Protection Legislation” in Chapter 5 (see p. 135).

Silence will not normally be misrepresentation. Only when there is a legislated duty, or some special relationship between the parties requiring disclosure, will failure to make such a disclosure constitute misrepresentation. A recent development in contract law is the recognition in a growing number of relationships that there is a duty of good faith between the parties. Where such a duty is present, there is an obligation to disclose pertinent information. The failure to do so may well be considered misrepresentation and can be challenged in court. Even in a business transaction where someone withholds information that would lead the other party to change his or her mind, the person withholding information could be violating the duty to act in good faith. Of course, where a misleading statement was made and it did not induce the other party to contract, there is no remedy. Suppose the vendor of a property told you that a company had purchased nearby property to build a resort and you purchased your property to build a home or for some other purpose not affected by that claim. You will have no complaint if the statement later turns out to be false, since it did not induce you to enter into the contract in the first place. When the false statement does induce a person to enter a contract, the misrepresentation may be considered innocent, fraudulent, or negligent (see Table 4.1 for a summary of the types of misrepresentation and their remedies).

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<th>Table 4.1 Remedies</th>
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<td>Negligent misstatement</td>
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<td>Misstatement—becomes a term of the contract</td>
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Innocent Misrepresentation

A distinction has to be drawn between someone who intentionally misleads and innocent misrepresentation. When a person misleads another without knowing, and he or she is otherwise without fault, the misrepresentation is said to be innocent. The recourse is limited to the equitable remedy of rescission. Rescission involves the court attempting to restore the parties to their original positions. Thus, if a seller had misrepresented the year of production of a car sold to you, honestly believing it to be true, and this was important enough to induce you to enter into that transaction, you could seek to have the contract rescinded on the basis of innocent misrepresentation. You would return the car, and the seller would be required to return the purchase price as well as any incidental costs you may have incurred, such as repair and maintenance expenses. Note that these are not damages (discussed below under remedies) but simply incidental payments designed to keep the appropriate balance between two innocent parties.

A problem arises when the goods have been destroyed, resold, or are otherwise not available to return to the other party. Rescission is then not possible. Where the misrepresentation has been innocent, no other remedy is available. Damages are not available. The remedy of rescission will also be refused where the victim of the misrepresentation has in turn done something inappropriate, such as causing unreasonable delay or having cheated or misled the other party. To obtain an equitable remedy such as rescission, the person seeking it must “come with clean hands.” Rescission will also be refused where the contract has been affirmed. This means that the victim has done something to acknowledge the validity of the contract after learning of the misrepresentation, such as trying to resell the goods to someone else.

Case Summary 4.3 Samson v. Lockwood

Rescission Not Available Where Contract Affirmed

Samson (Plaintiff/Respondent), Lockwood (Defendant/Appellant) in an appeal before the Court of Appeal for Ontario.

The defendants produced a brochure advertising property that stated that a building of 150,000 square feet could be built on it. Unknown to the defendants, because of a change in local by-laws, a building of only 30,000 square feet could be built. The plaintiff, after having read the brochure, agreed to purchase the property and put a substantial deposit down on the transaction. Before the actual transfer of that property, land values in the area dropped significantly. The plaintiff tried to sell the property, and when this proved impossible, he refused to go through with the transaction, claiming misrepresentation and demanding the return of the deposit. The court held that the plaintiff was not permitted to rescind the contract in this case. He knew of the error six months before the agreed upon date for the completion of the transaction, and yet he still indicated a willingness to complete. The plaintiff also attempted to sell the property to others long after learning of the error and before land values dropped. This amounted to affirmation of the contract after he already knew of the innocent misrepresentation. The result was that the purchase agreement was binding on him, despite the innocent misrepresentation in the brochure. The plaintiff was required to forfeit all of the deposit that he had paid.

Fraudulent Misrepresentation

Fraudulent misrepresentation takes place when one person intentionally and knowingly misleads another and induces him or her to enter into a contract. If it can be shown that you didn’t believe that what you were saying was true, you have committed a fraud and the remedies available to the defendant are expanded. Where the misrepresentation is fraudulent, the victim can seek rescission of the contract, or he or she can seek a remedy of damages for the tort of deceit, or both.

As mentioned earlier, damages involve the wrongdoer paying money to the victim to compensate for his or her losses. Because this is a tort remedy, the objective is to put the victim into the position he or she would have been in had the misrepresentation never taken place. In rare circumstances where the fraud is serious enough, the court will award punitive damages, which is an attempt to punish the wrongdoer rather than to compensate the victim. In such cases, the victim will be awarded more money than he or she has actually lost. Victims will often sue for innocent misrepresentation, even though the presence of fraud is apparent. This can be confusing until you appreciate the strategy involved. Establishing fraud and intention is much more difficult. Where the remedy sought is only rescission, the victim will usually take the easier route of suing for innocent misrepresentation. Note also that an innocent misrepresentation can become fraud if the person who made the statement later learns it is false and fails to correct the false impression left with the victim. Finally, it should be emphasized that a contract induced by fraudulent misrepresentation is voidable not void. The term voidable means that the victim can get out of the contract unless a third party has become involved. If goods that were the subject of the fraud get into the hands of a third party, the victim cannot get them back; however, she will still have a remedy of damages against the fraudster if he has any assets.

Negligent Misrepresentation

Historically, there was no difference between innocent and negligent misrepresentation. Since the victim was not knowingly misled, the only remedy available was rescission. In recent years, however, the courts have also awarded damages where it can be established that the wrongdoer should have been more careful. In such cases negligence is established. The legal rules associated with the tort of negligence were discussed in Chapter 2. To summarize, the remedy of rescission is available whether the misrepresentation is innocent, fraudulent, or negligent. However, the remedy of damages is restricted to circumstances where it can be established that the misrepresentation was fraudulent, negligent, or where the misleading term became part of the contract.

Case Summary 4.4 Ramdath v. George Brown College

**Damages Awarded for Negligent College Misrepresentation**

**Ramdath** (Designated Plaintiff), **George Brown College** (Defendant) in this class action before the Ontario Superior Court of Justice.

This class action was brought against George Brown College by a group of business students who claimed they had been the victims of misrepresentation. It was clear

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Footnote:

72012 ONSC 6173 (CanLII).
Criminal Fraud

Inducing someone to enter a transaction through intentionally misleading statements can also constitute a crime with potentially significant penalties. There are many specific provisions where various forms of fraudulent activity are prohibited, but for this discussion the most significant are sections 361–365 of the Criminal Code, which prohibit knowingly making false representations that are intended to induce someone to act on that representation. These provisions include obtaining credit, the extension of credit, or some other benefit for himself or herself or someone else under false pretences, including misleading statements about the financial condition of the applicant or others. Knowingly paying with a cheque without sufficient funds to back it (N.S.F.) or executing some other valuable security by making false representations are also specifically prohibited. Obtaining food, beverages, or accommodation by false pretences is also included. Section 380 contains provisions generally prohibiting fraudulent activities that cheat the public “of any property, money, or valuable consideration or service.” This is followed by a number of specific offences, including using the mails to defraud and fraudulent manipulation of stock exchange transactions. There are a number of other related offenses set out in the Criminal Code and other federal legislation. The violation of these provisions will subject the offender to significant fines and substantial periods of imprisonment.

LO 3 DURESS AND UNDUE INFLUENCE

Duress

Duress and undue influence also involve disputes related to the formation of contract. Duress occurs when the free will to bargain is lost because coercion, involving threat of violence, imprisonment, scandal, damage to property, or even inappropriate financial
pressure is exercised by one of the parties. If someone threatens to harm your family or vandalize your business to force you to enter into a contract, the agreement would be voidable (not void) because of duress. If you sold your car to A under threat, you could sue to have it returned because you sold it under duress. But if A had already resold the car to B, you can’t force B to give it up. Your only recourse is against A, the person who threatened you for damages. Historically, duress was only available where the threats were threats of violence or imprisonment to the contracting party or his family. In Canada this has been expanded and duress can also be claimed where the threats are against property or take the form of economic duress. A classic example of such economic duress took place when a landlord put inordinate pressure on a tenant to sign a lease with unfavourable provisions. The tenant had taken over a prior lease from a tenant who had left several months’ rent unpaid. She did so with the understanding that she was not obligated to pay that back rent. However, the rent remained unpaid, and the landlord insisted that she was responsible for it. She was completely committed to carrying on her business at that location and so, under tremendous pressure, she signed a new lease where she assumed the back-rent obligation. The court held that the landlord knew she had to sign to avoid “catastrophic financial losses.” This economic duress made the transaction unconscionable and released her of her obligations.8

Uttering threats of physical violence to a person, to his or her property, or even to his or her animals can also amount to the criminal offence of assault. Obtaining some advantage from people by threats or intimidation can constitute the criminal offence of extortion with serious penalties. Duress, as discussed above, may constitute criminal harassment or intimidation, which are also offences under the Criminal Code. These offences are also punishable by indictment up to 10 years in prison or by summary conviction up to two years in prison. The Criminal Code also makes it a summary conviction offence for an employer to threaten or intimidate an employee with respect to his or her trade union activities.

Note that where one person compels another to commit an offence by threats of death or immediate bodily harm, that can constitute a valid defence except where the crime involves very serious crimes such as high treason, murder, abduction, sexual assault, or robbery.

Undue Influence

Undue influence is more common. It also involves the loss of free will to bargain, causing the resulting contract to be voidable. Instead of force, the unique influence of the other contracting party takes away the free will of the victim. In certain types of relationships, undue influence is presumed. Examples include professionals such as lawyers, doctors, and trustees taking advantage of their clients, as well as guardians contracting with wards, religious advisors with parishioners, and adults with infant children or aging parents. The presumption of undue influence means that in the absence of other evidence to the contrary, simply showing that the relationship exists is enough for the court to allow the victim to escape the contract on the basis of undue influence. Professionals doing business with their clients often find themselves in such relationships, and they are well advised to ensure that the client obtains independent legal advice before committing to

the transaction. That will normally provide sufficient evidence to overcome the presumption of undue influence. There are other situations, however, where undue influence can arise based on the unique circumstances involved. For example in the Manitoba case *Francoeur v. Francoeur Estates*, when Oscar Francoeur learned he was dying of cancer, he transferred some of his estate to his nephew. When his brother, Arthur, found out, he got angry and demanded that Oscar transfer the rest of his estate to him and his wife. Arthur’s yelling at his brother and pressuring him to go to the lawyer and change his will the next day was clear evidence of undue influence, and the transactions and will were set aside.9

Where there is no legal presumption based on the relationship between the parties, the person trying to escape the contract must produce evidence of actual undue influence. This is much harder to do.

**Unconscionability**

The principle of *unconscionability* is related to undue influence. This is also a recently developed area of contract law that allows the court to set aside or modify the contract on the basis of vulnerability, such as poverty or mental impairment (short of incapacity) that has allowed one party to unfairly take advantage of the other. In effect, it must be shown that because of these factors the bargaining position of the parties was unequal, resulting in an unjust contract that was grossly unfair to the victim. Note that simple economic advantage will not create an unconscionable transaction. If you are charged a high rate of interest on a loan because you are a high risk, this is not an unfair or unconscionable contract. Most provinces have statutes regulating unconscionable transactions involving loans or mortgages, but unconscionability has now been expanded into contract law generally. A finding of unconscionability will sometimes persuade a court to disregard the terms of an exemption clause that limits the remedies of the disadvantaged party.

**LO 4 PRIVITY AND ASSIGNMENT**

**Privity**

The problems of privity and assignment are concerned with determining who has rights and claims under the contract and who can sue to enforce those claims. Privity of contract is a basic principle of contract law under which only the parties to a contract have rights. Strangers to the contract are not bound by it, nor can they enforce its provisions. In the example used in Chapter 2, *Donoghue v. Stevenson*,10 Mrs. Donoghue, after finding a decomposed snail in her ginger beer, could not sue the seller because she was not privy to the contract. Her friend bought the drink for her. Her only alternative was to sue the bottler/manufacturer for negligence. The same principle of privity prevents shareholders or investors in corporations from suing accountants or others who negligently do business for that corporation, such as providing incorrect audited financial statements. The corporation is considered a separate person, and the contract is between the accountant and that company—not the shareholder or investor. The only option for the shareholder is to sue in tort for negligence.


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There have always been some specific exceptions to the privity rule. Three important exceptions are: 1) interests in land that go with the land—thus a lease will bind not only the original owner and tenant but also any person to whom that land was sold during the term of the lease; 2) trust arrangements—where a person puts property in trust with a trustee for the benefit of some third party, that third party can enforce the trust though a stranger to the contract; and 3) life insurance—where the beneficiary is able to enforce the policy taken out by the deceased. Note as well that in some jurisdictions the restrictions of privity have been removed by statute, allowing, for example, the consumer of a product to sue the manufacturer for breach of contract, even though the original contract was with the dealer.

Case Summary 4.5 Ragoobir v. RGK Wheelchairs, Inc.\(^{11}\)

Only Parties to the Agreement Can Sue in Contract

Ragoobir (Plaintiff), RGK Wheelchairs, Inc. (Defendant) in a trial before the Superior Court of Justice (Ontario).

Anthony Ragoobir had lost a leg and needed a wheelchair. With the help of several support programs that supplied most of the funds, he approached Niagara Mobility, a dealer in St. Catharines in the business of selling wheelchairs. Niagara in turn referred him to RKG Inc. in Ottawa. A representative of that company (Mr. McClellan) attended at his home taking his measurements, which were then sent to RKG Wheelchairs Ltd. in England, which then proceeded to assemble a custom-made wheelchair for Mr. Ragoobir and supplied it to Niagara Mobility, who in turn sold it to Mr. Ragoobir.

He was satisfied with it at first but things then started to go wrong. Eventually the wheelchair fell apart and when the frame collapsed, it caused him to fall in front of a vehicle and he suffered serious injuries. There was a warranty supplied by the English company but in this action Mr. Ragoobir sued the Ottawa company (RKG Inc.) for breach of contract.

At trial that company was found to be liable for the loss but on appeal that decision was overturned. The court held that there was no contract between Ragoobir and the Ottawa company. The contract was between Ragoobir and Niagara Mobility and with the English company (RKG Ltd.) under the warranty. There was no privity of contract between Ragoobir and the Ottawa company (RKG Inc.) The seller was Niagara Mobility and the manufacturer/supplier was RKG Ltd. in England. The court also noted that there may well have been an action against RKG Ltd. (England) under the warranty and against RKG Inc. (Ottawa) in negligence but because the Ottawa company was not a party to the contract of purchase, RKG Inc. (Ottawa) could not be successfully sued for breach of that contract.

This case is relatively simple but strongly illustrates the operation of the principle of privity of contract. Only the parties to a contract are bound by it and have rights under it. It also shows how important it is to make sure you are suing the right person and for the right reason.

Note that when agents act for principals in dealings with third parties, the principle of privity does not enter into the situation, since the resulting contract is between the principal and the third party, and the agent is merely a go-between. Similarly, when one person takes over the obligations of another in a contractual relationship with a third party (called a novation), there is no privity problem since that new relationship requires a complete new contract between the newcomer and the original contracting parties. All three must agree to the change substituting a new contract for the old one. Note that such a new contract can be implied from the conduct of the parties. For example, where Jones

\(^{11}\)2009 CanLII 22803 (ON S.C.).
has a business delivering baked goods to various supermarkets there is a contract between Jones and those individual supermarkets. If Jones sells the business to Smith (assuming Smith and Jones are sole proprietors and no corporation is involved) and Smith started making the deliveries, the supermarkets would not have to accept, since their contract was directly with Jones, not Smith. The change between Jones and Smith could not be imposed on them. They must agree. But if they did permit Smith to make the deliveries, by implication they have consented to the change and a novation has taken place. Their contract is now with Smith, not Jones.

In addition to the statutory exceptions mentioned above, the courts have also shown a willingness to move away from the privity rule. For example, in the case of London Drugs Ltd. v. Kuehne & Nagel International Ltd. Kuehne & Nagel was storing valuable goods for London Drugs, and there was an exemption clause in that storage contract that limited any liability for loss to $40. Employees of Kuehne & Nagel caused considerable damage by careless handling of goods, and London Drugs sued them directly for the loss. Even though the employees were not party to the contract limiting liability to $40, the Supreme Court of Canada extended that protection to those employees treating them as third party beneficiaries of the limited liability clause, thus ignoring the rule of privity that normally would have applied.

LO 5 Assignment

Perhaps the most significant area where the rules of privity have been modified involves the assignment of contractual rights (see Figure 4.2). Assignment involves the assignor transferring a benefit to which they are entitled under a contract to a third party, called the assignee. In effect, they are selling an entitlement or claim to someone else. For example, if a debtor owes money to a creditor, that creditor can assign the claim to a third party. Merchants selling goods on credit, such as car dealerships, often do this. Their business is selling cars, not extending credit, so they assign the credit transaction they have entered into with their customer to a finance company for a fee, and the payments are then made to the finance company. Such assignments are also used as a method of securing debt. The merchant makes an assignment of his accounts receivable to the creditor conditionally so that if he defaults on the debt owed, that creditor then has the right to step in and collect those receivables. Secured transactions such as these will be discussed

Figure 4.2 Assignment

[Diagram showing the process of assignment]

12[1993] 1 W.W.R. 1 (S.C.C.). See also Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd., 1999 CanLII 654 (SCC), where the Supreme Court extended a “waiver of subrogation” provision in an insurance contract to a third party.
more extensively in the following chapter. Note that an assignment can also take place involuntarily where the person dies or becomes bankrupt.

The problems arise when the person owing the obligation that has been assigned fails to perform. Because of the rule of privity, the assignee cannot sue directly; the assignor and assignee must join together to sue the debtor. This is a cumbersome process, and most jurisdictions have enacted statutes that allow the assignee to sue directly if certain criteria are met. This is called a statutory assignment, and to qualify the assignment must be absolute. This means that it must be complete and unconditional; it must be in writing; and proper notice of the assignment must be given to the person owing the obligation that has been assigned. In the example above, the car dealership would make the assignment of the original debt owed by the purchaser to the finance company in writing. The finance company would then send a copy of that assignment to the debtor, asking that all future payments be made to it. In the event of default, the requirements for a statutory assignment have been met, and the finance company can sue the debtor directly. A further problem arises if an unscrupulous creditor assigns his claim to more than one assignee. Who does the debtor pay? The answer is that priority is based on the order of assignment as noticed to the debtor. The first in line has first claim.

Finally, it should also be noted that only benefits can be assigned, not obligations. In this example, if a car were defective, the dealership would still be responsible for their breach of contract, no matter what their agreement with the finance company said. The dealership cannot assign such obligations. For that reason, in any assignment, the assignee is said to take “subject to the equities.” Thus, if the car dealership doesn’t honour the warranty when something goes wrong, the purchaser would have an excuse not to continue paying the finance company. The assignee can be in no better position with respect to the contract than was the assignor. Of course, the assignor could normally have an employee or subcontractor do the work, but if it is not done, or done improperly, the assignee remains responsible.

Case Summary 4.6 Trans Canada Credit Corp. v. Zaluski et al.¹³

Promissory Note Enforceable Despite Salesman’s Fraud

Trans Canada Credit Corp. (Plaintiff), Zaluski (Defendant) in a trial before the Ontario County Court.

Green was a salesman representing Niagara Compact Vacuum Cleaner Company when he persuaded and pressured the Zaluski family into signing a conditional sales agreement and promissory note for the purchase of a vacuum cleaner. Niagara, in turn, assigned their interest in the transaction to Trans Canada Credit. When Zaluski made no payments, Trans Canada Credit sued Zaluski on the strength of the assigned conditional sales agreement and on the promissory note.

The court found that Green was guilty of fraud, which tainted the sale, thus giving Zaluski a good defence against Green and his principal Niagara. This defence also extended to Trans Canada Credit, which, as the assignee of the conditional sales agreement, could be in no better position than Niagara. But Trans Canada had sued on the promissory note, and this led to a different result. Once a negotiable instrument, such as a promissory note, gets into the hands of an innocent third party (called a holder in due course) they can enforce it independently of any failure on the part of the original party. Trans Canada Credit, as such a holder in due course, was in a position to enforce the promissory note, and therefore Zaluski had to pay. Negotiable instruments are extremely dangerous, and people should be careful

¹³(1969), 5 D.L.R. (3d) 702 (Ont. Co. Ct.).
Negotiable Instruments

The position of a third party can be quite different when a negotiable instrument is involved. **Negotiable instruments** have an ancient origin but are now controlled by the federal Bills of Exchange Act. These instruments are passed between people or institutions and represent claims for funds owing. The key to understanding negotiable instruments is to appreciate their free transferability from party to party. To facilitate this they have to be enforceable at face value. This is accomplished by first allowing the holder to collect on it even though no notice of the various transfers that may have taken place has been given to the original debtor. Secondly, and more importantly, they are made enforceable at face value by giving the innocent third party (called a **holder in due course**) who acquires possession without notice of any defect, the right to collect on it whether the original contractual obligations have been met or not—short of outright fraud or forgery with respect to the instrument itself. This must be contrasted with assignment, where the assignee takes subject to any claims between those initial parties to the transaction. That’s why Trans Canada Credit couldn’t sue on the strength of the original debt they had been assigned in the Zaluski case, above. The transaction was tainted by the fraud of the salesman, Green. But Zaluski also signed a promissory note, which is a negotiable instrument, and because Trans Canada qualified as a holder in due course with respect to that promissory note, they could enforce it directly against Zaluski. (This is an old case from a minor court but I have found no modern case that better illustrates the principle.) The defences with respect to assignment do not apply when a negotiable instrument and a holder in due course are involved. For this reason, most credit transactions include a promissory note so that the position of any third party acquiring rights under it can be protected. It is the existence of

**Holder in due course gets better rights than parties**

**Holder in due course must be innocent**

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this third party holder of the instrument that makes negotiable instruments so unique. If he is innocent in the sense of not being a party to or having notice of any wrongdoing, he qualifies as a holder in due course and can collect from the original maker despite any problems with the instrument. Today, because of an amendment to the statute in consumer transactions, when a negotiable instrument, usually a promissory note, is used to advance credit it must be stamped “consumer purchase” and then even a holder in due course will be subject to the same defences available to the original contracting parties.

Thus, when a purchaser gives a cheque in payment for a car and there has been misrepresentation, he or she can stop payment on the cheque as long as it is in the hands of the person to whom it is made out. However, if that cheque is transferred to an innocent third party, including the payee’s bank, the purchaser/drawer will have to pay, even though there has been misrepresentation, if that payee qualifies as a holder in due course. Note that the “consumer purchase” provision described above would not apply in that case since the cheque was given as payment and not as a tool to advance credit.

Negotiable instruments include cheques, bills of exchange (sometimes called drafts), and promissory notes, which can be used to advance credit and to transfer funds.

A **promissory note** is a signed, written instrument whereby one person promises another unconditionally to pay a specific sum of money at some future date or on demand (see Figure 4.3).

A **cheque** involves three parties. The drawer in writing unconditionally orders a bank where he or she has an account to pay a specific sum of money to a third party, who is called the payee. The drawer delivers the cheque to the payee, who normally then takes it to the bank and presents it for payment (see Figure 4.4). When the bank certifies the cheque, the bank has added their guarantee of payment and the drawer cannot then countermand it.

A **bill of exchange** or a **draft**, which also involves three parties (drawer, drawee, and payee), is similar but broader. A cheque must be drawn on a bank, but the bill of exchange can be drawn on any person or business. Also, the bill of exchange can be made payable at some future time, whereas the cheque must be payable on demand (see Figure 4.5). It is

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**Figure 4.3 Promissory Note**

**Figure 4.4 Cheque**

**Figure 4.5 Bill of Exchange**

Negotiable instruments take the form of:
- Promissory notes
- Cheques
- Bills of exchange or drafts
normal for the payee or holder of such an instrument to present it to the drawee for acceptance, especially where it is made payable at some future date. When it is accepted in this way, the holder is guaranteed payment by the drawee much like a certified cheque.

It must also be emphasized that when one of the persons in possession of the cheque or other negotiable instrument endorses the back before transferring it, he or she can also be held liable for the amount of the cheque if the original drawer fails to pay. There are several different types of endorsement, but where the holder merely signs his or her name (a blank endorsement), it becomes a bearer instrument negotiated simply by passing it from one person to another. When the holder adds the words “pay to the order of” it is an order instrument and the next person must also endorse it before transferring. In both cases the endorser has added his or her credit to the instrument and must be prepared to pay if the drawer fails to do so. Still, the use of a negotiable instrument does not guarantee payment. If the drawer of the cheque has insufficient funds in the account, or the maker of a promissory note can’t pay, you will be out of luck. For this reason the person entitled to payment will often insist on receiving a certified cheque. In this case the bank has accepted the obligation in effect adding their credit and guaranteeing payment.

Today with the growth of electronic banking and the common use of internet banking and credit and debit cards, negotiable instruments, especially cheques, are not used as much as in the past. But they are still commonly used and important to understand especially in commercial transactions.

### DISCHARGING CONTRACTUAL OBLIGATIONS

#### Performance

Most disputes with respect to contracts arise because of incomplete or improper performance of contractual obligations (see Table 4.2). This is called **breach of contract**, and there is a significant problem in determining just how imperfect performance has to be before it becomes a serious enough breach to discharge the other party’s obligations. A contract is **discharged by performance** once both parties have performed as required under the agreement and there are no further outstanding obligations. The terms of an agreement can be characterized as major terms, called **conditions**, and minor terms, called **warranties**. Be careful not to confuse the term warranty, as it is used here, with the assurance given by a manufacturer with respect to the quality of a product produced by them and sold to consumers (a manufacturer’s warranty). That is a specialized use of the term. The more formal use of warranty refers to any term of lesser importance (a minor term) in

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all contractual relationships. You can tell if a term is a condition or a warranty by applying the reasonable person test. Ask yourself whether, if the contracting party had known ahead of time that the term was going to be breached, he would still have entered into the contract. If he would have walked away, the term is a condition, but if it is likely that the contracting party still would have entered into the contract, with possibly some minor adjustment to the consideration to be paid, the term is of lesser importance or a warranty.

If a condition is breached after the contract is in place, the victim can elect to treat the contract as discharged. He or she doesn’t have to perform their obligations under the agreement since the contract has been discharged by breach. However, if a warranty is breached, the failure is not considered serious enough to discharge the contract or end the obligations of the non-breaching party. Thus, the contract is still in effect, and the non-breaching party must still perform his or her side of the agreement. There has been a breach, however, and the non-breaching party does have the right to seek compensation in the form of damages from the breaching party.

A similar result takes place when a condition is breached in some minor way. Even though a major term has been breached, the failure is so minor that the contract is considered substantially performed and the non-breaching party is still required to perform his or her obligations under the agreement. This is referred to as substantial performance. Of course, here there is also a right to seek compensation for the loss from the breaching party. If you were to order a new car from a dealership and it was delivered with regular wheels rather than the racing rims you specified, this would be a breach of warranty. You could not refuse to take delivery of the car and would have to pay the agreed-upon price, reduced by what it would cost to replace the wheels. If the car was delivered without an engine or a different model altogether was sent, this would be a breach of condition, and you could refuse delivery and would not have to pay for the car. If you operated a fleet of cars and ordered 1000 cars from the dealership and only 999 were delivered, this would be substantial performance of a condition of the contract (the delivery of 1000 cars). You would still have to pay, but only for the 999 delivered cars. Of course, if you contracted with your mechanic to fix the engine in your car and after working on it for weeks it wasn’t fixed even though he had done substantial work there is no substantial performance. Here only complete performance, fixing the engine, will do. It is good practice for the parties to such agreements to specify the various terms as conditions if they are important to that party. This is especially true where it may appear as only a minor term to an outsider. Thus, if you were to order a car in a particular shade of yellow and it was delivered in orange, that would normally be a breach of a warranty. But if you were in a franchise business where all of the franchisees drove vehicles of that colour, getting a vehicle in the same colour would be a vital part of the purchase transaction. You would be protected if you had specified that shade of yellow as a condition of the contract.

When money is involved, there are some special rules. A cheque, even a certified cheque, is not the same as cash. If the contract calls for the payment of a specified amount of money, that means Canadian legal tender unless otherwise specified. Cheques can be used if their use has been agreed to or has been the accepted method of doing business in the past. When in doubt, make sure that actual Bank of Canada bank notes are delivered. Even Canadian coins do not qualify as legal tender over a specified amount. For example, under the Currency Act 15 anything over 25 pennies is not considered legal tender. All

coins have restrictions in this way; the amount that can be used varies with the denomination of the coin. However, there is no similar limitation on bills.

It should also be noted that one party can’t prevent the other from performing and then claim to be relieved of his or her obligations because the other party has failed to properly perform his or her contractual obligations. As long as the performing party is ready, willing, and able to perform and has attempted to do so, that **tender of performance** is considered equivalent to proper performance of the contract. Suppose I agree to paint your house and arrive at the time specified with the appropriate paint and brushes, and you refuse to let me in. I have lived up to my contractual obligation. If you fail to pay me, you are the one in breach, not me. Again, money is treated differently. If I owe you money and come ready to pay it at an appropriate time and place, and you refuse to take it, I still owe you the money. But there is one significant change in my obligation. Normally, it is the debtor’s obligation to seek out the creditor to make payment. But I have done that, and now the obligation will be upon you to seek to collect the money from me. You must bear any expenses (including court costs) arising in that process.

**Breach**

As noted, a serious breach of contract can discharge the other party of his or her obligations under the contract. This breach of contract could take place by incomplete or improper performance of the contractual obligations. The breach can also occur through **repudiation**. This involves one of the parties informing the other that he is refusing to perform his contractual obligations, or doing something that makes proper performance impossible (implied repudiation). When the repudiation takes place before performance is due, it is called **anticipatory breach**, and the victim of that breach has two options. He can either ignore the repudiation and continue to demand performance, or treat the contract as discharged and make other arrangements. Treating the contract as ended allows the victim to make other arrangements and to sue right away rather than waiting for the actual failure before suing. If the victim must hire someone else to do the job, for example, any higher costs can be recovered in that action. On the other hand, if the victim continues to demand performance, the damages eventually recovered may be higher, but there is also the danger that some unexpected event such as a fire, natural disaster, or even sickness may make the contract impossible to perform. Such an event would discharge both parties of their obligations by frustration (discussed below). Worse, the victim of the repudiation may find that he is no longer in a position to perform, making him the one in breach. The victim is bound by whichever choice he or she made.

If the refusal to perform comes after performance is due, this is just another form of breach through failure to properly perform contractual obligations. The remedies available for such a breach will be discussed below. Of course, it takes both parties to end a contract and where one party breaches a condition the other is discharged from their obligations only when they choose to treat the contract as ended. If the victim of the breach still wants to go through with their side of the agreement, they may do so where it is still possible to perform. If I were to purchase an antique automobile from you in running condition, and you were to deliver it without an engine, I would be entitled to refuse to go though with the transaction because of your breach of condition, but if I still wanted the car I could take it, either by ignoring the breach or reserving the right to sue you for compensation at a later date.
As discussed earlier in the chapter, parties to contracts will often include terms limiting their liability when breaches do occur. Because parties are free to include in their bargains whatever they want, such exemption clauses are an important part of doing business. In the absence of other forms of misconduct or interfering legislation, how successful they are at limiting liability will depend on how carefully those clauses are worded or in rare circumstances on public policy considerations (see Chapter 5).

Case Summary 4.7 BP Global Specials Products (America) Inc. v. Conros Corporation

Anticipatory Breach by Conduct Gives Right to Terminate Contract

BP Global Special Products (America) Inc. (Plaintiff), Conros Corporation (Defendant) in a trial before the Superior Court of Justice (Ontario).

Conros was in the business of producing fire logs, and an essential ingredient in the manufacturing process was slac wax. BP was in the business of supplying this product and entered into a contract with Conros to supply a specified amount of slac wax at a given price. However, over the term of the agreement Conros failed to make the contracted purchases at the rate agreed. During that period there was evidence that Conros was purchasing slac wax on the open market and not ordering from BP as agreed. There was also evidence that during slow sales periods they were not purchasing from BP as a tactic to negotiate a lower price.

Because BP had put infrastructure in place in the form of shipping arrangements and storage, receiving no orders from Conros put significant pressure on BP to lower its price, which in effect was tantamount to blackmail. When BP did deliver the product to Conros, it refused to take delivery unless the price was reduced. The court found that this clearly showed by conduct that Conros considered themselves no longer bound by the contract. This was not agreed to or waived by BP and so amounted to repudiation of the contract in the form of anticipatory breach. Accordingly, BP refused to make any further deliveries. The court found that BP was justified in terminating the remainder of the contract and suing. Note here that Conros’ conduct amounted to an anticipatory breach, and BP had a choice: it could elect to demand performance of the contract or to treat it as terminated. The court found that by conduct BP communicated to Conros their election to terminate. BP was thus entitled to sue. Instead of compensation for damages suffered, BP was awarded an amount sufficient to put them in the position they would have been in had the contract been properly performed.

Finally, it should be noted that under rare circumstances a breach of contract can amount to a criminal offence with serious penalties. For such a breach to constitute a crime under section 422 of the Criminal Code, the breaching party must know, or have reasonable cause to believe, that the breach will result in danger to human life, serious bodily injury, or serious property damage; or that the breach will delay a train; or even deprive a city (or a significant part of it) of light, power, gas, or water. See Table 4.3 for a summary of the types of performance and breach.

Frustration

A contract discharged through frustration is a recognition that the parties should not be penalized when events happen that are out of their control. Frustration usually takes place when after the contract has been entered into, performance becomes impossible, such as

\[\text{Frustration ends contractual obligations}\]
when the subject matter of the contract is destroyed before performance through no fault of the parties. A contract can also be frustrated when performance is still technically possible, but would lead to a completely different result because of the changing circumstances. For example, if you were to rent a room to view a parade and the parade was cancelled for some reason that would likely frustrate your contract. It would be possible to still occupy the room, but the whole basis for the contract would be gone; to require you to go through with it now would be something essentially (or fundamentally) different from what you intended, especially when you consider the higher rental rate you would likely be paying.

The kinds of situations that can lead to a contract being frustrated are personal illness, destruction of the subject matter, an event the contract was based on being cancelled or changed, and interference by government (such as changing the law, refusing permits and licences, or expropriating property). For a contract to be frustrated, the changing events leading to frustration must be unforeseen and outside the control of either party and prevent the proper performance of the contract. Such events destroy the foundation of the contract and make performance impossible or something completely different from what was contemplated. Suppose that Jones contracted to build a house for Smith, but was denied a permit due to a change in government regulation. That would likely be frustration. But if he was denied that permit because of his failure to supply necessary plans or other documentation, that would be breach of contract, since the matter was within his control. This is referred to as self-induced frustration, which is simply a breach of contract. Also the frustrating event must be fundamental. If the job simply became uneconomical because of rising prices, Jones would still be obligated to build the house.

Sometimes a provision will be put into the contract such as stating what will happen and who will bear the loss in the event of such frustrating events. If that is the case, the provisions of the contract will prevail. For example a force majeure clause is often included sometimes referred to as an “act of god” clause freeing both parties from any liability
should such an event such as war or natural disaster take place. This is a good risk-reducing practice and illustrates that it is vital when drafting contracts to carefully set out the obligations of the parties avoiding any ambiguity, but also to anticipate what can go wrong and provide for that eventuality. Similarly, when ongoing obligations are involved, a term specifying under what conditions those obligation will end will often be included in the contract, thus avoiding a problem. This is an example of a condition subsequent, discussed below.

Case Summary 4.8 KBK No. 138 Ventures Ltd. v. Canada Safeway Limited.17

Zoning Change Frustrates Contract

KBK (Plaintiff/Respondent), Canada Safeway (Defendant/Appellant) in this appeal before the Court of Appeal of British Columbia.

In this case KBK paid a first installment of $150,000 towards the purchase of property from Canada Safeway for a total purchase price of $8.5 million. The property was advertised as a “prime Development opportunity”, with a zoning of C-2, and KBK made it clear that the purpose of the purchase was to develop a mixed commercial and residential condominium project. Unexpectedly, the director of planning for the city made a successful application to reduce the zoning of the property from CD-2 to CD-1 which had the effect of reducing allowable building square footage from 231,800 to 30,230 making the condominium project impossible. KBK refused to complete the purchase and brought this action for the return of the $150,000. The court had to decide whether the contract was frustrated. At trial the judge held that this was not a situation where the contract just became more inconvenient, difficult or less economical. Rather an intervening unexpected event took place that was out of the control of either party, that “radically altered” the contract transforming it into something fundamentally different from what the parties originally intended. This amounted to frustration. The Court of Appeal agreed, dismissing the appeal.

This case nicely illustrates what constitutes frustration and its effect on a contract. Here it was still technically possible for KBK to complete the purchase even after the unexpected and unforeseeable intervening event, but to do so would have led to a result fundamentally different from what the parties originally intended. Note that since KBK had received nothing under the Frustrated Contracts Act it was entitled to the return of the deposit.

Historically, the effect of a frustrated contract was simply to “let the loss lie where it falls.” Both parties were discharged of any further obligations, keeping any benefits and bearing any losses that had been incurred to that point. But that was seen to be unfair, and today all jurisdictions have enacted frustrated contracts acts that overcome much of this unfairness. Essentially, if either party has benefited from a partially performed contract, he or she will have to pay for that benefit. If a deposit has been paid and no benefit has been received, the deposit must be returned. Note that a portion of that deposit can be retained to compensate for costs incurred in preparing to perform the contract. The British Columbia Frustrated Contracts Act goes further by requiring the parties to share equally any costs incurred, even where no deposit has been paid. Note that the Sale of Goods Act states that where goods have perished the contract is avoided, placing the risk on the seller who must return any money paid unless the parties have otherwise agreed.

172000 BCCA 295 (CanLII).
Agreement

Changing legal relationships through agreement is the basis of contract law. Just as contractual obligations are created by agreement, they can be modified or ended by agreement as well. But for a discharge by agreement to take place, all of the elements necessary to form a contract must be present. The problems usually arise with respect to the requirements of consensus and consideration. One party cannot impose such changes on the other without his or her consent. If one party decides to pay less, or not go through with the contract without the agreement of the other party, that is simply a breach of contract.

The lack of consideration is a more difficult problem. Where both parties are relieved of some obligation—or get something more by the change—there is no problem. This is normally the situation where the parties agree to end a contract that has not yet been performed. Both are relieved of their obligations and so both get a benefit from the change. The contract is said to be rescinded. Where the parties agree to discharge the old contract and substitute a new one with different major terms or parties, the same principle applies. This is called a novation. Sometimes the parties agree to changes to end or modify a contract that benefits only one side. In these circumstances the party benefited must agree to do something extra for the changes to be binding. This is referred to as the process of accord and satisfaction. In the absence of such an arrangement, the person benefiting from the gratuitous promise cannot enforce it. Still, where the person making the gratuitous change to the agreement changes his or her mind and then brings an action to enforce that original provision, the other party, who has relied on the change, may be able to raise promissory estoppel as a defence. It should be noted that in almost all instances where promissory estoppel has been applied by the court, the gratuitous modification of a prior contractual obligation was involved. Consideration and promissory estoppel are discussed in detail in Chapter 3.

Finally, it should be noted that the original contract might include conditions that will end or modify the obligations. In some circumstances where there are ongoing obligations such as employment or rental, the contract may include an option for one of the parties to terminate upon giving proper notice. Since the obligations of both parties will end there is sufficient consideration. More commonly, there will be a condition precedent or a condition subsequent included. A condition precedent is a term requiring that some event or circumstance must take place first before the obligations set out in the contract become binding on the parties. When someone buys a house subject to selling his or her old one or subject to arranging financing at a particular rate, that is a condition precedent. Until it is met, there is no obligation under that contract. Conditions precedent are most commonly found in purchase and sale agreements involving real property, but they can be included in any contract where something is required to happen before the obligations assumed by the parties are to be binding on them. Contracts involving continuing obligations will sometimes include terms specifying when that obligation will end; this is called a condition subsequent. A contract to supply food services until a particular construction project is finished is an example of a condition subsequent. Again, good practice requires great care in drafting such clauses to ensure their proper operation, especially when things don’t go as planned.
Remedies for Breach

When a dispute arises over the formation of a contract, judicial remedies are designed to put the parties in the position they were in before the contract was entered into. Thus, where there has been misrepresentation or the contract is void or voidable, the court will usually grant rescission and attempt to put the parties back to their pre-agreement positions. But when the dispute relates to improper or incomplete performance, the remedies attempt to put the injured party in the position he or she would have been in had the contract been performed properly. In the first case the courts look back, and in the second case they look forward.

Case Summary 4.9 Tang v. Zhang

Deposit Forfeited Despite No Damages

Tang (Appellant/Plaintiff), Zhang (Respondent/Defendant) in this appeal before the Court of Appeal of British Columbia.

Tang agreed to sell and Zhang to purchase residential property for $2,030,000. Zhang paid a $100,000 deposit to be "... absolutely forfeited to the seller... on account of damages." Zhang notified Tang that they would not be going through with the purchase and requested the return of the deposit. Tang refused and after some time sold the property to a third party at a higher price. This action was brought by Tang in order to retain the deposit claiming that since the property was sold at a higher price, there were no damages and the deposit should be returned. On appeal that decision was overturned. Here the court found that a true deposit was to be forfeited if the purchaser failed to go through with the purchase. The term was not enough. There had to be an indication that the deposit was to be forfeited upon non-completion of the contract, as was the case here. The statement that the deposit was to be applied against damages had effect only if there were damages. It had no effect on the fact that it was to be forfeited if the purchasers repudiated the contract.

The case is valuable in that it shows that a true deposit is to be forfeited upon repudiation. There must be clear indication that it is to be forfeited and reference to damages does not take away from the fact that a true deposit can be lost. Also the amount involved must not amount to an unreasonable penalty. In this case it was not.

Damages

The primary remedy for a breach of contract is the awarding of damages. This is an order for the breaching party to pay a monetary award to the victim of the breach in an attempt to put him or her in the position he or she would have been in had the contract been performed properly (expectation damages). When someone agrees in contract to sell his yacht to one person for $100,000 and then sells it to another, he might well be sued for breach of contract. If the victim of the breach had to pay $110,000 to obtain a similar yacht, the damages awarded would be the difference ($10,000) plus any costs incurred. When the loss can be calculated, such as where wages already lost are involved or where more money had to be paid to accomplish the contractual purpose, as in the example above, this is referred to as special damages. But where the damages have to be estimated, as in compensation for pain and suffering, lost enjoyment of life, or even

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Remedy of damages involves money payment

182013 BCCA 52 (CanLII).
an estimate of lost future earnings, this is referred to as an award of general damages. These amounts are usually given to compensate for monetary loss, but in some cases, when appropriate, the courts today are also willing to provide monetary compensation for emotional stress or pain. For example, in medical malpractice actions and in wrongful dismissal cases, the courts will often take into consideration any pain and mental upset in the damage award. A classic example where damages for mental distress were awarded involved a hospital that in breach of contract improperly disclosed confidential information that implied the plaintiff may have been infected with AIDS. Normally, punitive damages designed to punish the breaching party rather than compensate the victim for the loss are not available for breach of contract. They are sometimes awarded where a tort such as fraud is also involved, or in other special circumstances. For example in the case of Whiten v. Pilot Insurance Co., the Supreme Court of Canada reinstated a jury award of $1 million punitive damages to a couple whose fire insurance claim was refused by the insurance company on the completely discredited grounds that the family had torched their own home. The family had found themselves out in the street in winter conditions in their bedclothes as a result of the fire, and the fire chief and the insurance company’s own investigators and experts all said there was no evidence of arson. The company, knowing the family was in financial distress, cut off their benefits without explanation and continued with protracted litigation, refusing to honour their contractual obligation. This conduct caused the jury, to make, in addition to normal damages, a $1 million award of punitive damages. The Court of Appeal for Ontario recognized the outrage of the jury, but clearly stated the objective of avoiding “uncontrolled and uncontrollable awards of punitive damages in civil actions” when it reduced the award of punitive damages to the more reasonable amount of $100,000. This result was appealed to the Supreme Court of Canada, which reinstated the $1 million punitive damage award, agreeing with the jury that a “powerful message of denunciation, retribution, and deterrence had to be sent.”

In general, punitive damages are to be awarded only in exceptional cases involving “malicious, oppressive, and high-handed misconduct that offends the court’s sense of decency.” In a breach of contract case for punitive damages to be awarded, there must also be stand-alone wrongful conduct present. Usually, this will be some tort such as fraud or breach of fiduciary duty, but in rare cases that stand-alone wrongful conduct need not constitute an independent tort. In the above breach of contract case that independent wrong consisted of the insurance company’s breach of their duty to act in good faith, and while that did not constitute an independent tort it was sufficient to support an award of punitive damages.

The parties can agree in the contract to limit the amount of damages to be paid in the event of a breach. We have discussed exemption and limitation clauses above where one party limits the damages for which they will be responsible. Similarly, a contract will sometimes specify just what will have to be paid in the event of a given breach. These are called liquidated damages. For example, an electrician may have a term in his contract that he loses $50 per day for every day he is late on a contract. A prepaid deposit is a form of liquidated damages. When someone purchases a new car, he or she will usually be required to pay a certain amount as a deposit before delivery. If the purchaser fails to go

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through with the deal, that amount will be forfeited as a pre-estimation by the parties as to what damages will be paid in the event of breach. Another form of prepayment that must be distinguished is a **down payment**. This is simply the first payment of the purchase price and is not forfeited in the event of breach. The terms used are not conclusive, but where the contract does not provide that the prepaid amount is to be forfeited upon breach, it is a down payment and is not directly available as damages. For such a liquidated damages clause to be enforceable it should be an honest attempt by the parties to pre-estimate what damages would be suffered in the event of a breach and not to unreasonably penalize the breaching party. Limitation and exemption clauses discussed above have a similar effect.

There are significant limitations on the availability of damages in contract law. First, the victim must mitigate his or her loss. That means the victim must take all reasonable steps to minimize that loss. Failure to do so will reduce the damages awarded to what should have been lost had there been proper **mitigation**. For example, when someone is wrongly dismissed from his or her employment, he or she has an obligation to mitigate by trying to find another job. Any damage award for wrongful dismissal will be reduced by what the person earns (or should have earned) from that alternate employment. Second, the victim of the breach can only receive compensation in an amount that was reasonably foreseeable by the breaching party at the time they entered into the agreement. This means that unreasonable or unexpected losses are too remote and cannot be claimed. In one case, a victim of fraudulent misrepresentation was induced to enter a franchise agreement to purchase and service soft drink and food dispensers. The court awarded compensatory damages, including the recovery of the initial investment, and also awarded punitive damages for the fraud. But the plaintiff had also put a deposit down on a van to be used to service the dispensers, which had to be forfeited when the franchise arrangement failed. He also sought compensation for the loss of his deposit on the van, but the court held that the purchase of the van was not part of the franchise agreement and was therefore too remote and could not be recovered.22

### Equitable Remedies

Sometimes monetary compensation will not sufficiently compensate the victim of a breach. The Courts of Chancery developed several remedies that are still available when a contract is breached. Note, however, these equitable remedies are not available when money damages would provide adequate compensation, when there has been wrongdoing on the part of the person seeking the remedy (including unreasonable delay), and when some innocent third party would be adversely affected.

**Specific Performance** This is an equitable remedy that requires the breaching party to perform his or her part of the contract. Where the goods involved are unique, such as a painting by a famous artist, no amount of money will compensate if the seller changes his or her mind. A specific performance remedy involves the court ordering the breaching party to actually transfer the painting to the buyer. Land transactions are often remedied by an order for specific performance because each plot of land is unique.

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Injunction

An injunction is used in contract and in tort to stop a person from doing something that is wrong. If the party breaching a contract is involved in some activity inconsistent with the proper performance of the contract, the court may order him or her to stop doing it. If I rented a hall from you to put on a concert and you changed your mind, I could seek an injunction to prevent you from renting that hall to anyone else. I could also seek an order of specific performance forcing you to let me use it as per the original contract. It should also be noted that just as it can be good practice to include liquidated damages clauses in a contract, so too it may be helpful to set out in the actual contract other appropriate remedies for a breach. For example, putting in a clause stating "in the event of breach it is acknowledged that irreparable harm to the victim will result, that monetary compensation would not provide adequate compensation, and therefore the victim of the breach will be entitled to relief by way of preliminary injunction or other remedy." Such a provision should make it easier to obtain that injunction.

Accounting

There are other types of specialized equitable remedies. An accounting is available when profits have been diverted and it is difficult to determine just what injury has taken place. The court can order the breaching party to disclose financial records and dealings, and to pay any profits obtained through their wrongdoing to the aggrieved party.

Quantum Meruit

This remedy is applied when the contract is breached before all work has been done or when no specific consideration has been agreed upon for services rendered. Here, the court orders a reasonable amount to be paid for what has been done. If you seek help from a plumber or mechanic, often you don’t agree on a price ahead of time. You are then required to pay a reasonable price on the basis of quantum meruit, which is what you are billed, unless you immediately protest and dispute the amount claimed. See Table 4.4 for a summary of the remedies for a contract breach.

Case Summary 4.10 Alumitech Architectural Glass & Metal Ltd. v. J.W. Lindsay Enterprises Ltd.

Payment Owed for Work Done with or Without a Contract

Alumitech Architectural Glass & Metal Ltd. (Plaintiff/Defendant in Counterclaim), J.W. Lindsay Enterprises (Defendant/Plaintiff in Counterclaim) in a trial before the Nova Scotia Supreme Court.

Examining only the counterclaim, both Alumitech and J.W. Lindsay Enterprises bid on a job at Dalhousie University and Alumitech got the job. J.W. Lindsay Enterprises made a separate deal with Alumitech to do some of the work, but eventually a dispute arose as to how Lindsay Enterprises was to be paid. One thought there was to be a flat-rate price, and the other thought the payment was to be based on a unit price per square foot completed. The court found that there was no consensus between the parties, the price being a very important term of the agreement. With no consensus there was no contract, but since there had been a considerable amount of work done, the court awarded a remedy to Lindsay Enterprises based on the principle of quantum meruit. Applying this remedy the court then determined a fair and reasonable price for the work that had been done, and the award was based on that. This amounted to a calculation based on the costs incurred plus a small allowance for profit. Quantum meruit is an equitable remedy where someone receiving a benefit is required to pay a reasonable price for that benefit received, even in the absence of a binding contract.

232006 NSSC 14 (CanLII).
**Table 4.4 Remedies**

<table>
<thead>
<tr>
<th>Remedies</th>
<th>Type</th>
<th>Nature</th>
</tr>
</thead>
<tbody>
<tr>
<td>Damages</td>
<td>Common law</td>
<td>Money compensation limited by mitigation and remoteness</td>
</tr>
<tr>
<td>Liquidated damages</td>
<td>Contract</td>
<td>Deposit forfeited or contract terms specify damages to be paid</td>
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<tr>
<td>Specific performance</td>
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<td>Order to perform contract terms</td>
</tr>
<tr>
<td>Injunction</td>
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</tr>
<tr>
<td>Accounting</td>
<td>Equitable</td>
<td>Order to disclose and pay over profits to victim</td>
</tr>
<tr>
<td>Quantum meruit</td>
<td>Equitable</td>
<td>Order to pay reasonable amount for services supplied</td>
</tr>
</tbody>
</table>

**Key Terms**

accord and satisfaction (p. XX)
anticipatory breach (p. XX)
assignment (p. XX)
bill of exchange (p. XX)
breach of contract (p. XX)
cheque (p. XX)
condition precedent (p. XX)
condition subsequent (p. XX)
conditions (p. XX)
deposit (p. XX)
discharge by agreement (p. XX)
discharge by performance (p. XX)
down payment (p. XX)
duress (p. XX)
duty of good faith (p. XX)
economic duress (p. XX)
fraudulent misrepresentation (p. XX)
frustration (p. XX)
fundamental breach (p. XX)
holder in due course (p. XX)
innocent misrepresentation (p. XX)
liquidated damages (p. XX)

misunderstanding (p. XX)
mitigation (p. XX)
negligent misrepresentation (p. XX)
negotiable instruments (p. XX)
non est factum (p. XX)
novation (p. XX)
one-sided mistake (p. XX)
parol evidence rule (p. XX)
 promissory note (p. XX)
rectify (p. XX)
repudiation (p. XX)
rescission (p. XX)
shared mistake (p. XX)
standard-form contracts (p. XX)
statutory assignment (p. XX)
substantial performance (p. XX)
tender of performance (p. XX)
 unconscionability (p. XX)
undue influence (p. XX)
void (p. XX)
voidable (p. XX)
warranties (p. XX)

**Questions for Student Review**

1. Distinguish between a shared mistake, a misunderstanding, and a one-sided mistake and explain how a court would deal with each of these problems. What other terms are used to refer to such mistakes?

2. Distinguish between innocent, fraudulent, and negligent misrepresentation, and indicate the remedies available for each.
3. Explain why it is easier to succeed with an action for innocent misrepresentation than for fraudulent or negligent misrepresentation.

4. Distinguish between a void and voidable contract. Why is this important to the discussion of duress and undue influence?

5. Explain what is meant by a presumption with respect to undue influence, the effect of such a presumption, and under what circumstances those presumptions will occur.

6. When will the courts find a contract to be unconscionable? What effect will that have on the position of the parties?


8. Explain what is meant by assignment in contract law, and indicate any limitations on what can be assigned.

9. What is necessary for an assignment to qualify as a statutory assignment? What is the importance of such a designation?

10. What does it mean to say the assignee is “subject to the equities”?

11. Define a negotiable instrument and distinguish between a cheque, a bill of exchange, and a promissory note.

12. Explain the position of an endorser of a negotiable instrument.

13. What is necessary for a person to qualify as a holder in due course? Why is that designation significant?

14. Distinguish between conditions and warranties, and explain how this can affect the discharge of contractual obligations.

15. Explain what is meant by substantial performance and how that can affect the discharge of contractual obligations.

16. Explain what is meant by repudiation and, in particular, the effect of anticipatory breach on the position of the parties to a contract.

17. What will cause a contract to be discharged through frustration and what are the consequences?

18. How has the effect of a frustrated contract been modified by statute?

19. What is necessary for a contract to be discharged or modified by agreement?

20. Explain the role promissory estoppel sometimes plays in the discharge or modification of a contract by agreement.

21. Distinguish between a condition precedent and a condition subsequent.

22. Explain the nature of an exemption clause in a contract and how the courts deal with such a provision.

23. Explain the remedy of damages as it applies to breach of contract.

24. Explain how damages for breach of contract are calculated and any limitations on their availability.

25. How are equitable remedies treated differently from an award of damages for breach of contract?

26. Distinguish between specific performance, an injunction, an accounting, and quantum meruit.

Questions for Further Discussion

1. The law of contract is, to a large extent, based on the barter model. The guiding principle of this model is that the parties are in an equal bargaining position negotiating balanced
Chapter 4 Enforcing Contractual Obligations

terms with which the courts shouldn’t interfere. However, in recent years the courts are showing an increasing willingness to overturn terms such as exculpatory clauses, or they are stepping in to protect individuals on the basis of good faith or unconscionability. Consider whether, in the process of attempting to ensure fairness in contract law, the courts and legislatures have unduly interfered with the underlying principle of the parties’ freedom to contract as they wish. Should the guiding principle or the assumption that the parties are in an equal bargaining position be abandoned and the courts take on more of a protective role?

2. Discuss the principle of privity of contract and whether it has any place in modern law. In your answer consider the problems it presents when the person injured by products or services supplied under contract is not the party who originally contracted for that product or service. Also look at the growing number of exceptions, including assignment of contractual rights and negotiable instruments, and consider whether the retention of privity causes more harm than it overcomes.

3. Consider the discharge of a contract through frustration. There are several restrictions on the application of frustration, such as the fact that the interfering event must be unexpected and out of the control of either party. In addition, legislation has been passed modifying the common-law position of “let the loss lie where it falls.” Consider whether anyone should be allowed to escape his or her contractual obligations on the basis of frustration. Should the application of the principle be broader so that there are not so many limitations involved? Does the statutory interference reduce the problem or make it worse? Is there any place for the doctrine of frustration in modern contract law?

4. Whether they were misled intentionally or innocently will not affect the nature of the injury suffered by the victims of false statements. However, it makes a significant difference to the remedies available to the victims if they were misled intentionally or innocently. The victims of intentional misrepresentations can sue for damages, whereas the victim of an innocent misrepresentation can ask only for rescission. Should a distinction be drawn between fraudulent and innocent misrepresentation in determining the availability of damages as a remedy? Does the recognition of negligent misrepresentation solve the dilemma?

Cases for Discussion

1. Miller Paving Limited v. B. Gottardo Construction Ltd. 2007 ONCA 422 (CanLII); 285 D.L.R. (4th) 568

Miller supplied materials (aggregate) to the general contractor, Gottardo Construction, which was building a road extension for SLF. After supplying the material, Miller would invoice Gottardo, which would check the invoice against deliveries and then pay by cheque. At the end of the job Miller submitted the final invoice, which Gottardo paid, and then Miller and Gottardo signed a contract entitled “Memorandum of Release.” This document was an acknowledgement by Miller that it had been paid in full and indicated that it was binding on all parties. Unfortunately, Miller discovered that a number of invoices for over $400 000 had been missed and subsequently submitted them to Gottardo for payment. The construction company refused to pay, and this action was brought seeking the outstanding payments. What would be the basis for their action. Explain the arguments on both sides and the likely outcome.


Robert Harrity, the principal of Northeast Yachts, acted as an agent in the sale of a Bayliner boat owned by Malcolm Clark and sold to Margaret Kennedy. As Kennedy looked over
the boat, Harrity stated that it had a new motor, a new drive, and a painted hull. The boat was purchased after having the boat surveyed by a marine surveyor. Unfortunately, after five hours of use the motor broke down with several things going wrong. It turned out that the engine was not new but rebuilt and Kennedy sued. Harrity claimed that when he stated that the engine was new he meant it was new to that boat. What is the basis for Kennedy’s complaint, the arguments for the parties and the likely outcome? How would it affect your answer to know that after the sale when the bill of sale was drawn up a paragraph was added. This document stated that the boat was inspected, that the boat was bought “as is, where is,” and that there were no other representations from the agent with respect to the transactions.

3. 968703 Ontario Ltd. v. Vernon, 2002 CanLII 35158 (ONCA)
Vernon agreed to have the assets of his business sold at auction with the proceeds to be deposited in a bank account. Vernon was to get the first $450 000, the auctioneer was to get the next $150 000, and anything else was to be split 70/30. But after two days the auctioneer made no bank deposit, keeping the entire $100 000 proceeds for himself. Vernon refused to let him back on his property to complete the auction. The auctioneer sued and Vernon countersued. Explain the arguments for both parties, who breached the contract, and their resulting responsibilities. How would it affect your answer to know that the auctioneer had sold some of the assets belonging to Vernon at a lower price than agreed, to a company with which the auctioneer was associated?

Ms. Cassidy had a contract to work as part of an authoring team to produce a social studies text to be used in the public schools. Her contribution, among other things, was to provide a chapter on criminal law. Unfortunately, the Ministry changed the curriculum requirements and her contribution could no longer be used. She was dropped from the writing team with no compensation for the work she had done. She sued. Explain the arguments raised by both sides and the likely outcome. Note that this is a province where the Frustrated Contracts Act requires compensation to be paid for work done benefiting one of the parties.

Mr. and Mrs. Rodrigues entered into a contract to sell their home to Elizabeth Walters in July of 2004. Mrs. Walters paid a deposit of $10 000 and the agreement was conditional upon Mrs. Walters being able to obtain financing for the purchase. On 4 August 2004, the agent presented a waiver of the condition precedent, indicating that Mrs. Walters had arranged financing for the purchase. On the strength of the now-firm contract, Mr. and Mrs. Rodrigues entered into a contract to purchase another home from James Barclay, putting down a substantial deposit. When the time came to complete the transaction Mrs. Walters told Mr. and Mrs. Rodrigues that she did not have the financing in place and that she would not be going through with the purchase unless they lowered the price. This forced the Rodrigues to terminate their contract for the Barclay home, forfeiting the deposit paid. They also were threatened with a substantial lawsuit and had to pay an additional amount to settle the matter. The Rodrigues sued Mrs. Walters. Explain the basis of their complaint. What is the likely outcome and what would be included as a remedy? What difference would it have made if Mrs. Walters had not waived the subject to financing clause?

Mrs. Ewachniuk had a son and two daughters. In 2006 at the age of 90 she died leaving a $2 million estate. In 2004 she had changed her will and left everything to her son. He had once practiced law and drew up the will for her and had it executed. Prior to this she had left her estate to be divided equally between her three children. The two daughters brought this action challenging the will. What would be the basis of their argument and the likely outcome? Would your answer be any different with the knowledge that the son had been responsible for preserving the family fortune back in the 1960’s from serious tax problems, and it was this fortune that had supported Mrs. Ewachniuk and her deceased husband over the years? There was no evidence of anything happening in the years immediately prior to the changed will that would have given her a reason to change it.