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AN INTRODUCTION TO THE STUDY OF THE LAW OF CONTRACTS: AN EDITOR'S COMMENT

The law of contracts has been called "an affirmation of the human will to [shape] the future" through the "extraordinarily powerful mechanism [of] protecting [the] exchange into the future." Macneil, *The New Social Contract* (1980), at 6-7. Its study should be valuable to you for a number of reasons. You will gain a familiarity with the substantive law, that is, the law relating to the formation of contracts, factors affecting the validity of contracts, and remedies for breach of contract. This is important in itself and provides a useful stepping-stone to courses drawing on the general principles of contract law, such as sale of goods, consumer protection, insurance, real estate transactions, and labour law. In terms of the basic values underlying legal systems generally, reflection on a value fundamental to the law of contracts, namely freedom of contract, will equip you to engage in analysis of areas of law where overlapping or conflicting values are at stake, such as human rights law and property law.

On a different level, you will also acquire a variety of basic skills associated with the analysis and use of case law and, to a rather lesser extent, legislation. This book is designed as an aid to the acquisition of these essential skills, via the study and discussion of the decisions of the courts as well as statutory law and academic comment. You will notice a continuing emphasis on the application of rules and principles to hypothetical fact situations, as well as notes and questions designed to encourage you to consider the direction of possible law reform.

An understanding of principles and the acquisition of legal techniques and skills are not all that is important to the person who wishes to have a legal education. The law should not be studied in a philosophical vacuum, without consideration of its function in society and without discussion of the value judgments inherent in any judicial decision or legislative rule. Since values change and since the common law is made up of a large number of decisions based on particular fact situations, the law is constantly evolving, at some times more rapidly than at others, and is not made up of a static body of rules, simply awaiting discovery by the conscientious student.

However, the urge to find the reassuring certainty of a settled and coherent body of doctrine with its own internal logic is an understandable one and is in fact reflected in some of the enormously rich academic writing about the law of contracts. No one approach to the study of this area of law is emphasized here,

as this book is intended to contain what the contributors feel to be core materials for a basic course in the principles of contract law. Your own instructor will direct you to and discuss with you the writings that he or she feels will best promote critical reflection on the basic material reproduced here. However, it may be useful at this point to consider some broad themes.

1. The Classical Theory of Contract

There is academic debate about the point at which it was possible to say that a body of law containing general principles relevant to all contracts had emerged, but there is some agreement that what is often called the "classical" theory of contract, consistent with the ideology of *laissez faire* liberalism, flourished in the 19th century. This is a shorthand way of referring to a number of ideas—that the law could be reduced to statements of rules, and conflicting cases labelled as "wrong"; that the law was concerned with the objective manifestation of agreement, not the parties' private thoughts; that freedom existed for people to contract as they chose; that the law should leave individuals free to maximize their private advantage; and that contractual liability was strict once a bargain that the law recognized as a contract had been struck. These ideas retain great power, and some academic writing still gives the impression of a rather stable body of rules relating to such familiar headings as Offer, Acceptance, and Consideration. The roots of contract law in English sources are still evident, and statutory changes have tended to be concentrated in areas that have acquired the status of subjects to be studied in their own right, such as sale of goods and human rights, mentioned earlier.

The idea that there is a stable body of doctrine has been confronted with cogent arguments that we must pay attention to what the courts are actually doing. In one controversial and stimulating book, *The Death of Contract* (1974), Gilmore concludes, at 102:

> I have one final thought. We have become used to the idea that, in literature and the arts, there are alternating rhythms of classicism and romanticism. During classical periods, which are, typically, of brief duration, everything is neat, tidy and logical; theorists and critics reign supreme; formal rules of structure and composition are stated to the general acclaim. During classical periods, which are, among other things, extremely dull, it seems that nothing interesting is ever going to happen again. But the classical aesthetic, once it has been formulated, regularly breaks down in a protracted romantic agony. The romantics spurn the exquisitely stated rules of the preceding period; they experiment, they improvise; they deny the existence of any rules; they churn around in an ecstasy of self-expression. At the height of a romantic period, everything is confused, sprawling, formless and chaotic—as well as, frequently, extremely interesting.

When reading the cases in this book consider to what extent Canadian judges adhere rigidly to what they conceive to be established doctrine, particularly in the form of English case law, and the extent to which you can find traces of experimentation (whether stated or not) with "romantic" ideals relating to the purposes of contract law.

Law is a social construct and so for various societal reasons, including economic, technological, and social, the law must change and adapt over time. Examples include the creation of a body of labour law in response to the industrial revolution and the modern law of negligence in response to the increasing complexity of social interaction. The law of contracts is no different. As new technologies emerge that allow parties to contract in a multiplicity of fashions, the law of contracts must adapt to meet these developments. The recent widespread use of the Internet and e-mail has presented one such challenge. As Michael Geist writes in *Internet Law in Canada*, 3rd ed. (2002), at 598:

> In certain respects, the introduction of new technologies has not disrupted the "ebb and flow" of contract law. It has adequately adapted to the internet predecessors such as post mail, telex machines and fax machines. E-mail and the World Wide Web are simply the newest incarnations along this evolutionary path.
>
> The Internet does, however, present some novel issues . . . contracts consummated "on the fly" without an underlying relationship . . . clickwrap agreements. . . . a contract that is assented to by clicking "I Agree" . . . [and] can parties be bound to new terms after the exchange of consideration?

In this edition, increased attention is paid to issues of how the law is developing to confront such novel issues.

2. The Intersection of "Private" and "Public" Law

It would be a mistake to think of the law of contracts as exclusively concerned with private exchanges. There are many ways in which the private or free market presupposes, overlaps or exists in tension with public regulation.

First, as Trebilcock, a law and economics scholar, graphically writes in *The Limits of Freedom of Contract* (1993), at 23:

> [I]f political, bureaucratic, regulatory, judicial, or law enforcement offices were auctioned off to the highest bidder, or police officers, prosecutors, bureaucrats, regulators, or judges could be freely bribed in individual cases, or votes could be freely bought and sold, a system of private property and private exchange would be massively destabilized.

Indeed, it has been said, for instance, by Hutchinson, a critical legal scholar (in his comment on Trebilcock's book, "Michael and Me: A Post-Modern Friendship" (1995), 33 Osgoode Hall L.J. 237 at 244), that the free market is a form of government regulation in itself.

Second, markets are not simply left to operate untouched by democratic decisions about how to promote such things as equality, a healthy environment, safe and fair working and housing conditions, and the public welfare in general. Debates about the appropriate balance between private ordering and public regulation, for instance, in relation to such areas as rent control and minimum wage laws, are commonplace with respect to the law of contracts. Such debates about the relative value that should be placed on autonomy and welfare considerations take place most dramatically in relation to such areas as preconception contracts (surrogacy) and sexuality, discussed in Chapter 13 on Illegality and Public Policy, although it seems to be relatively uncontroversial in Canada at the moment that some things, such as blood and human organs, should not be commodified. You will find that thinking about such issues makes it clear that, as Trebilcock also

notes, *supra*, at v, "[b]ehind the law of contracts lies a much broader set of economic, social, and political values that define the role of markets in our lives."

3. "Freedom of Contract"

There are signs of judicial as well as legislative moves away from a rigid insistence on the idea that people are *free* to contract as they wish (which has, of course, never been true to more than a limited extent), and that therefore contracts are sacred, towards a recognition of the economic and psychological realities of contracting. You can draw on your own experience as to the degree to which freedom of contract is a reality. On a trivial level, have you ever tried to negotiate a dry cleaning contract? On a much more fundamental level, do you believe that anyone has refused to contract with you, for instance, by refusing to rent you an apartment because of your race or because you were on welfare? Might a contract have been terminated because of the discovery of your sexual identity, as in *Vriend v. Alberta,* [1998] 1 S.C.R. 493? For an example of drawing on experience of discrimination rather than freedom, see Grider, "Hair Salons and Racial Stereotypes: The Impermissible Use of Racially Discriminatory Pricing Schemes" (1989), 12 Harv. Women's L.J. 75. One can turn as well to empirical research into how freedom may be affected by social location. One well-known investigation was into the price paid for cars in Chicago. See Ayres, "Fair Driving: Gender and Race Discrimination in Retail Car Negotiations" (1991), 104 Harv. L.R. 817. Ayres found that retail car dealerships systemically offered significantly better final prices on identical cars to white men than they did to black people and women. Moreover, he notes at 829, race and gender discrimination were synergistic or "superadditive": the discrimination against the black female tester was greater than the combined discrimination against both the white female and the black male tester." See also Ayres, "Further Evidence of Discrimination in New Car Negotiations and Estimates of its Cause" (1995), 94 Mich. L. Rev. 109. More recent research has focused on insurance contracts, raising concerns about availability, service, cost and coverage linked to social location. See, for instance, Glenn, "The Shifting Rhetoric of Insurance Denial" (2000), 34 Law and Society Rev. 779, and Tarr, "Civil Orders for Protection: Freedom or Entrapment?" (2003), 11 Wash. U. J.L. & Pol'y 157 (re insurance for battered women) at 177.

There are legal as well as empirical limits on freedom of contract, some of which are the subject of debate. For instance, the Trillium Gift of Life Network Act, S.O. 1990, c. H.20, s. 10, states:

> No person shall buy, sell or otherwise deal in, directly or indirectly, for a valuable consideration, any tissue for a transplant, or any body or part or parts thereof other than blood or a blood constituent, for therapeutic purposes, medical education or scientific research, and any such dealing is invalid as being contrary to public policy.

Furthermore, the law has responded to experiences that freedom of contract includes freedom to discriminate in various ways. While the primary focus of these materials is on the common law principles of contract law, you should be aware that there is legislation dealing with such matters as consumer protection, employment standards and residential tenancies. As mentioned above, an important body of law which interacts with contract law relates to human rights, legislative efforts to combat such evils as racism and sexism in the market. Indeed concerns about freedom of contract and freedom from discrimination are significantly intertwined. For instance, the Human Rights Code, R.S.B.C. 1996, c. 210, s. 13 prohibits, among other things, discrimination in employment.

While debates about the freedom of contract and discrimination are closest to the surface in relation to government regulation, there are similar tensions in the common law itself. While the common law of contract has not developed a principle of non-discrimination, it has become more activist in protecting vulnerable people. This can be seen in a number of doctrines. For example, the doctrine of unconscionability offers some protection from unfair bargains. Here the law insists on individual responsibility to avoid taking advantage of inequality. Another area where arguments can be made about the appropriate mix of self-interest and responsibility toward others is the evolving doctrine of good faith. This doctrine is evolving, although it is not yet possible to say that there is a general obligation to act in good faith in negotiation and performance. See generally, Beatson and Friedman, *Good Faith and Fault in Contract Law* (1995) and Burton and Anderson, *Contractual Good Faith* (1995). As you study these materials, try to identify areas where there is an explicit or implicit imposition of a duty to act in good faith and consider what the content of such a duty might be. For instance, is there a duty to negotiate the renewal of a lease in good faith? To what extent are aggrieved parties likely to be denied remedies where they have failed to act in good faith? A further discussion of this concept, which transcends basic contractual doctrine relating to formation and performance of contracts, will be postponed until later in this book.

Finally, there is a tendency to present freedom of contract (the emphasis on individual autonomy) and freedom from economic oppression (the emphasis on both collective responsibility and individual responsibility for others) as competing sets of values. For an argument that each principle needs the other for its own coherence, see Brudner, "Reconstructing Contracts" (1993), 43 U.T.L.J. 1, at 7:

> On the one hand, without any restraint in the name of equality, freedom of contract contradicts itself, for it collapses into the right of the stronger. On the other hand, the absolutization of equality destroys freedom of contract and thereby contradicts itself as a realization of equal *autonomy*.

Given such debates, some writers find it useful to refer to modern contract law as neoclassical. Thus:

> [A]s a matter of substantive principle neoclassical contract law attempts to balance the individualist ideals of classical contract with communal standards of responsibility to others.

Feinman, "The Significance of Contract Theory" (1990), 58 U. of Cinn. L.R. 1283, at 1287-88. (This article contains a useful overview of the principal theories of contract outside the neoclassical mainstream.)

4. What Promises are Enforceable?

Not all promises are legally enforceable, so a central question for the contracts lawyer concerns the identification of those which are. Expectations, reasonable and otherwise, can be aroused by a number of things, so that the initial chapters of this book are devoted to materials relating to the creation of the obligation—the issue of what it is that people do to attract the enforcement machinery of the law with respect to their commitments. The traditional view has been that expectations are only protected where they have been aroused by an exchange, or by the promise of an exchange. Contracts lawyers use the term of art "consideration" to refer to the idea that a promise must usually be bought in some way to be enforceable. Thus, if someone had been promised a gift of $1,000 and, as a result, had at least some expectation of receiving that amount, the law would not normally enforce the promise because it lacked "consideration". The law might have been influenced to a greater extent by morality and developed a rule that *all* promises should be kept (although there might be economic objections to this). One alternative that is already having some impact on the law is that promises which have been reasonably relied upon should be kept. See, *e.g.*, Atiyah, "Contracts, Promises and the Law of Obligations" (1978), 94 L.Q.R. 193. He argues, at 207, that there is an "increased emphasis on reliance and [a] declining stress on free choice" and states these ideas more fully in his book, *The Rise and Fall of Freedom of Contract* (1979).

You will start to develop your own ideas soon about which obligations are (and should be) legally enforceable—when an expectation by one individual is sufficient justification for imposing a legal obligation on another. In doing this it will be necessary to look behind the words of the judges who decide cases, and who often still find the justifications for their decisions in discovering the "intentions" of the parties. When you encounter this type of language consider to what extent the judge tries to discover the "intention" of the parties and to carry out that intention, or whether in some cases this is simply a convenient way of saying, without appearing too paternalistic, that the judge is satisfied that the result reached is a fair one.

5. What Remedy for Breach?

The language of "expectation" and "reliance" is also used with respect to another fundamental issue. Once it is established that an enforceable promise exists, and there is a breach of that promise, the question becomes one of the appropriate remedy. Of course it must be remembered that in the vast majority of cases contracts are performed and any disputes are settled without recourse to the courts. It is an assumption that perhaps can be said to form part of the classical theory of contract law that legal remedies have an impact on human behaviour. That cannot be demonstrated without empirical research into what contracting parties actually do and think, and there is at least one school of thought which minimizes the significance of the law as a mechanism for dispute settlement. Macaulay, in his article, "Elegant Models, Empirical Pictures and the Complex-

[illegible] of Contract" (1977), 11 Law and Soc. R. 507, at 510, states that "other [illegible] of dispute avoidance and settlement are usually available that will [illegible] acceptable results, allow relationships to continue and cost much less [illegible] litigation". The law and lawyers are supposed to be providing a service for [illegible]. If the law is too complex and unpredictable, as well as being destructive rather than supportive of continuing relationships, then it is surely not living up to the reasonable expectations of those consumers.

The usual remedy for breach is the award of damages, although in some cases the aggrieved party (the plaintiff) will be entitled to the remedy of specific performance—an order to the party in breach (the defendant) to carry out his or her promise—or an injunction—an order to the defendant not to act in breach of contract. These remedies are available where monetary damages are not a sufficient remedy. The amount of money that the plaintiff should get as compensation often poses difficult problems for the courts. Should the plaintiff get his or her out of pocket or reliance losses or should there be an entitlement to the amount of profit that the plaintiff expected to make out of the contract? Will there necessarily be a clear distinction between the two? Clearly the answer will not always be the same and the answer is intimately bound up with the rationale for the decision to enforce the promise in the first place. In some cases neither expectation nor reliance losses will be appropriate or even sought by the plaintiff, who may simply want out of the contract and therefore ask for the remedy of rescission, with restitution of any benefits that have already passed. While you are thinking about which promises should be enforced, it is useful to bear in mind that you can make an argument for enforceability which takes into account the amount of damages that the plaintiff should get in case of breach. Flexibility of approach to the award of damages is an aid to creative argument as to which promises should be enforced.

6. Theories of Contract Law

Material that throws light on these issues and that has become increasingly influential in recent years relates to the study of law in its economic context. Although enthusiasts of the analysis of law from an economic standpoint do not claim that this approach answers all our questions about contract law, the growing body of literature does help to provide a stimulating perspective. There would probably be general agreement (though not necessarily agreement on its contents) that the classic text in this area is Posner, *Economic Analysis of Law*, 6th ed. (2003), which contains a section on contracts, with discussion of such matters as the economic reasons why the law enforces some promises and not others, and recognizes some excuses for non-performance. For a critique of such economic analysis see Atiyah, "Executory Contracts, Expectation Damages, and the Economic Analysis of Contract", in *Essays on Contract* (1986), at 150-78. A major Canadian contribution to this literature is Trebilcock, *The Common Law of Restraint of Trade* (1986). Professor Trebilcock argues that the common law is not particularly efficient in this area of contract law and an extract from this work is used to illustrate some problems with judicial assumptions relating to standard

form contracts in Chapter 8. In the following materials you are referred from time to time to writings which utilize an economic perspective in a particular context.

A body of scholarship, often referred to as "critical legal studies", has built upon realist insights, which focus on how law functions in practice. See *e.g.*, Cohen, "The Basis of Contract" (1933), 46 Harv. L. Rev. 553. Critical scholars take issue with the conventional presumption about law as being true, valid, and useful in a non-ideological way, suggesting that law actually is a constructed reality, the form, substance, and method of which conceals its problematic, controversial, and ideological nature. See *e.g.*, Gabel and Feinman, "Contract Law as Ideology" in Kairys (ed.), *The Politics of Law* (1982), at 181.

As well, there is now a body of feminist analysis of this area of law. It may be useful to approach such analyses from a fundamental theoretical perspective, focusing on the concept of social contract. Such a perspective draws on contract theory to suggest how human political organization should be understood. While treaties with aboriginal peoples could provide legitimacy for the Canadian state in its exercise of power over aboriginal peoples, and marriages still, for some, provide legitimacy for some sexual relations, the theory of the social contract attempts to provide legitimacy for the exercise of power in itself. Pateman describes the social contract in her book, *The Sexual Contract* (1988), as follows, at 2:

> Social contract theory is conventionally presented as a story about freedom. One interpretation of the original contract is that the inhabitants of the state of nature exchange the insecurities of natural freedom for equal, civil freedom which is protected by the state. In civil society freedom is universal: all adults enjoy the same civil standing and can exercise their freedom by, as it were, replicating the original contract when, for example, they enter into the employment contract or the marriage contract.

As a theory it was chiefly used to criticize traditional forms of authority, but it largely neglected the exclusion of women from the status of equal, civil freedom. Pateman states, at 6:

> In the natural condition 'all men are born free' and are equal to each other; they are 'individuals' . . . how in such a condition can the government of one man by another ever be legitimate; how can political right exist? Only one answer is possible without denying the initial assumption of freedom and equality. The relationship must arise through agreement. . . . But women are not born free: women have no natural freedom. The classic pictures of the state of nature also contain an order of subjection—between men and women. With the exception of Hobbes, the classic theorists claim that women naturally lack the attributes and capacities of 'individuals'. Sexual difference is political difference. . . . Women are not party to the original contract through which men transform their natural freedom into the security of civil freedom.

The story of how exclusion was given concrete social and legal form is now familiar. Until relatively recently women lacked the vote, and achieved it in stages reflecting variations in their status. There were barriers to employment, and married women lacked capacity to enter into contracts. In general the state collaborated in the subjection of women rather than protecting their equality and civil freedom. Privacy ideology was a powerful force in justifying the exclusion of women from public life and denying them the protection of the state in their private life. See, *e.g.*, O'Donovan, *Sexual Divisions in Law* (1985).

But does this exclusion of women from the social contract until relatively recently have any implications for current contract law? Thready has noted that, historically, "contract pertained to market transactions, which generally excluded familial bargaining; and . . . women were barred by law and custom from engaging in market transactions." ("Feminists and Contract Doctrine" (1999), 32 U.B.C. L. Rev. 1247.) It would be surprising if modern law did not bear at least traces of this history.

Some commentators reject this idea. Thus, Madame Justice Wilson, in her Osgoode lecture on "Will Women Judges Really Make a Difference?", expressed the view that there were whole areas of law in which there is no uniquely feminine perspective, and gave the law of contracts as an example.

> Taking from my own experience as a judge of fourteen years' standing . . . there are probably whole areas of law on which there is no uniquely feminine perspective. This is not to say that the development of the law in these areas has not been influenced by the fact that lawyers and judges have all been men. Rather, the principles and the underlying premises are so firmly entrenched and so fundamentally sound that no good would be achieved by attempting to reinvent the wheel, even if the revised version did have a few more spokes in it. I have in mind areas such as the law of contract, the law of real property, and the law applicable to corporations.

((1990), 28 Osgoode Hall L.J. 507, at 515)

As you study various contractual doctrines, such as intention to create legal relations, unconscionability or public policy, you may wish to test that view. For instance, feminist scholars have tended to be critical of contract law's emphasis on the notion of exchange, fundamental to the doctrine of consideration. See, *e.g.*, Williams, "On Being the Object of Property" (1988), 14 Signs 8. "Contract's role in fueling a market-based economy has rendered it suspect . . . garnering it criticism for encouraging unadulterated self-interest and commodification" (Testy, "An Unlikely Resurrection" (1995), 90 Northwestern U.L.R. 219, at 222). Feminist analyses have been critiqued in their turn, for instance for failing to include perspectives drawn from lesbian legal theory. Indeed, Testy argues that lesbian theory is resurrecting contracts by recognizing its complexities and its potential for empower women.

Students who have an interest in feminist legal debates, and who may wish to critique *these* materials from a feminist perspective should consult Frug, "Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook" (1985), American Univ. L. Rev. 1065.

Much of the feminist work that has been published focuses on particular issues of public policy taken up in Chapter 13, Illegality and Public Policy, such as preconception contracts. See, *e.g.*, Devlin, "Baby M.: The Contractual Legitimation of Misogyny" (1988), 10 R.F.L. (3d) 4. Such work raises questions of general importance since it draws attention to the taken-for-granted assumptions about the boundaries of contract law. In reading the materials, you may wish to consider the implications of the focus on the commercial rather than the family context:

> Present law, like the society it reflects, assumes that the family is and should remain primarily, a universe defined in status terms, a universe of love, not money, of commitment, not negotiation, of relationship, not autonomy.

(Dolgin, "Status and Contract in Feminist Legal Theory of the Family: A Reply to Bartlett" (1990-91), 12 Women's Rights Law Reporter 103, at 107.)

Questions about boundaries, and indeed the fundamental value of contract law, will arise with respect to the doctrine of Intention to Create Legal Relations, in Chapter 4.

There is also a significant body of feminist literature on specialized legislative topics, such as pay equity, domestic work, affirmative action and human rights, which are largely beyond the scope of this book. But see, *e.g.*, Macklin, "Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?" (1992), 37 McGill L.J. 681.

7. Relational Contracts

Other perspectives deal with issues which underlie a great deal of thinking about contracts, such as whether traditional doctrine is adequate to deal with the enormous variety of types of contract. One influential commentator has pointed out that there is an unwarranted focus on one-time exchanges rather than on ongoing relationships. The work of Ian Macneil is well known as pointing out the importance and ubiquitousness of relational transactions, such as employment contracts and long-term supply and service agreements.

> Modern contractional relations too tend to involve large numbers of people, often huge numbers of people. Even the family and small enterprises of various kinds usually involve more than the two parties of the paradigm discrete transaction.

(Macneil, *The New Social Contract* (1980), at 21.)

His work contains a powerful critique of the law relating to the paradigm contract as not being responsive to relational transactions, which should be examined in their context. See most recently Macneil, "Relational Contract Theory: Challenges and Queries" (2000), 94 Nw.U.L.Rev. 877, in "Relational Contract Theory: Unanswered Questions A Symposium in Honor of Ian R. Macneil", *ibid.*

Relational contract theory recognizes that parties may not be able to fix all terms at the moment of contracting (even supposing that moment can be identified, as the material on the Battle of the Forms in Chapter 2, section 4 will illustrate). As well, parties in a long-term relationship may not wish to be confrontational or maximize their short-term advantage. Law that may be appropriate to, *e.g.*, a contract for the purchase of a car, may not be as useful to the parties to a long-term contract for the sale of natural gas. Such variation presents a challenge to contract doctrine, but so does the development of separate rules for relational contracts. See Eisenberg, "Why There is No Law of Relational Contracts", *ibid.*

On the other hand, people with good reason to lack confidence in how they will be treated by others in the future may try to insist on detail agreed in advance and may see law as some protection from exploitation. For a powerful account of how the author, an African American woman, insisted on a detailed lease, see Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987), 22 Harv. C.R.-C.L. L. Rev. 401. For a discussion of Macneil's work in the context of "intimate private ordering—the quintessential relational contract", see Christensen, "Legal Ordering of Family Values: The Case of Gay and Lesbian Families" (1997), 18 Cardozo L.R. 1299. He argues at 1336-37 that acceptance of Macneil's critique "may hold out the best hope available for the development of a gay friendly contract law".

For a discussion of relational theory linked to a feminist approach, see Halpern and Linzer, "The Flesh-Colored Band Aid—Contracts, Feminism, Discourse, and Norms" (1991), 28 Hous. L.R. 791, and for a response, Dow, "Law and Feminist Chic and Respect for Persons: Comments on Contract Theory and Feminism in '*The Flesh-Colored Band Aid*'", *ibid.*, at 819.

8. First Nations and Treaties

Questions about boundaries and appropriateness of contract analysis also arise with respect to treaties between the Crown and First Nations peoples. While issues of how such treaties should be analyzed are too specialized to be more than touched on in a book of this nature, students should be aware that contract law and theory may be drawn upon in cases ranging from a simple sale of goods to complex agreements between peoples. Treaties are not of course simply contracts in the ordinary sense — they could be seen as resembling international agreements and as having a constitutional quality, reflecting fundamental commitments. See, for instance, Cardinal, *The Unjust Society* (1969), at 28, "to the Indians of Canada, the treaties represent an Indian Magna Carta". Even if contract analysis, which may not capture such contested international/constitutional qualities, were appropriate, it is not yet clear that, in Canadian law, treaties are accorded the status of contract, with the connotations of sanctity that implies.

In *Pawis v. R.* (1979), 102 D.L.R. (3d) 602 (Fed. T.D.) the Ojibway plaintiffs sued the Crown for, among other things, breach of contract. They argued that, by enacting the Ontario Fishery Regulations under the Fisheries Act without exempting the Ojibway people from their application, the Crown breached the contractual obligations it had undertaken in the Lake Huron Treaty of 1850. The court, while saying that it was obvious that the Treaty was not a treaty in the international law sense, agreed that it was "tantamount to a contract". However, the plaintiffs lost, the court implying a term that the treaty was subject to possible future regulations, that the regulations could not at the same time be legal and a breach of contract, and that the plaintiffs did not have the status to sue as individuals. It should be noted, however, that it is possible to find treaties binding as treaties without engaging in contract analysis, depending on what remedy is being sought. See *R. v. Simon* (1985), 23 C.C.C. (3d) 238 (S.C.C.) in which the court held that the appellant, a Mi'kmaq, had a treaty right to hunt that could not be restricted by provincial legislation. See generally, Miller (ed.), *Sweet Promises: A Reader on Indian-White Relations in Canada* (1991).

Treaties, or any contracts between governments and aboriginal peoples, or between governments acting on behalf of aboriginal peoples and other parties, are different from most contracts in that the Crown has a fiduciary obligation to aboriginal peoples, so that the normal assumptions about the social utility of the pursuit of self-interest are not applicable.

> [T]he government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

R. v. Sparrow, [1990] 1 S.C.R. 1075, at 1110. The fact that "the honour of the Crown" is at stake with respect to treaties makes them stand out, as a form of contract, in sharp relief against the general law of contracts, where fiduciary duties are exceptional, albeit now supplemented by the fledging doctrine of good faith, mentioned earlier. Nevertheless a study of contract law will alert you to many questions relevant to issues of pre-contract obligations, interpretation and enforcement. For instance, is there an obligation to negotiate in good faith? Is there is a difference between treaties and modern commercial transactions between two parties of relatively equal bargaining power? Is interpretation strict or generous, and how do the courts reconcile different perspectives? When can terms be implied? When can evidence be offered that treaties were partly oral and partly written? See generally *Marshall v. Canada* (1999), 177 D.L.R. (4th) 513, [1999] S.C.J. No. 55 (S.C.C.).

Attention to treaties also illustrates the point that contracting takes place in many different contexts, thus creating a need for doctrinal flexibility.

9. Transcending Conceptual Boundaries

A further point flowing from the fact that there are many different ways of thinking about contract law and its response to changing social realities, is, obviously, that you should try and develop your own ideas about the law. It may be helpful to that effort to avoid thinking of contracts, or any of your courses, in "pigeonholes". The law of contracts does not occupy a well-defined conceptual territory of its own. It obviously overlaps with other areas of law such as property, criminal law and, particularly, torts. Indeed there is no reason why a breach of contract should not be regarded as simply another species of tort, as indeed it once was, especially if the law develops in the direction of the enforcement of promises inducing reasonable reliance, as Gilmore argues in *The Death of Contract*. Torts and contract law, however, have tended to evolve separately, at least since the nineteenth century, although it is still important not to draw a rigid line of demarcation between the two subjects. It is increasingly common, for example, to find a single case involving potential liability in both areas, so that the student and the practitioner must consider all possible remedies. The law relating to the overlap between torts and contracts is discussed in Chapter 7 of this book.

A significant example of an overlap is, as mentioned above, that between the law relating to aboriginal rights, treaties and contracts, streams of law which often are considered in isolation. See Bell and Buss, "The Promise of Marshall on the Prairies: A Framework for Analyzing Unfulfilled Treaty Promises" (2000), 63 Sask. L. Rev. 667 at 673. Another important overlap, is with the developing law of restitution or quasi-contract, which provides a remedy in many cases of "unjust enrichment", outside the purview of contract and tort remedies.

Canadian law recognized unjust enrichment as a distinct legal doctrine in a series of cases starting with *Deglman v. Guaranty Trust Co.* [[1954] S.C.R. 725], part of which is set out in Chapter 4, section 8(c)(iii). Restitution is particularly important where the contract fails for some reason such as uncertainty, mistake, or frustration, and will be considered in the chapters dealing with these topics, as well as in Chapter 7. For a useful, brief survey, see Justice McLachlin, "Restitution in Canada" in Cornish, Nolan, O'Sullivan and Virgo (eds.), *Restitution Past, Present and Future* (1998), 275 and generally, Maddaugh and McCamus, *The Law of Restitution*, 2nd ed. (2004).

Therefore, although it is essential to classify the law temporarily in order to analyze it, the student is urged to retain an awareness of such vital interrelationships.

10. A Final Word of Caution

Perhaps a more important warning, however, relates to the need to keep these materials in perspective. The student should realize that the emphasis on case law, especially appellate case law, is not the only way to study "law" and represents a particular focus which not all would accept as useful. One alternative would be to discover empirically-recurring problems for contracting parties and examine the impact of the law on these problems, rather than allowing the choice of appropriate areas of study to be dictated by the lottery of litigation. Such an approach would concentrate on the total functioning of the law, that is, on the ecology of the law as a means of social control and as a mechanism for dispute settlement. Although this approach is not adopted here, our contributors preferring to concentrate on the inculcation of skills associated with more traditional materials, it is important to remember that this has significant limitations, dictated by the objectives chosen. Nevertheless, it is vital to bear in mind, while studying the following materials, that judicial decisions and legislative choices must be tested against the values of providing a body of law which meets the needs of people who enter into contracts and of creating an efficient decision-making process.

FORMATION OF THE AGREEMENT: OFFER AND ACCEPTANCE

1. Introduction

The classification of private obligations in common law systems has traditionally depended upon a distinction between obligations based on consent to an exchange (often to take place in the future), which are the province of the law of contracts, and obligations created by the general law, which are considered under the headings of torts and restitution. The distinction has been increasingly criticized in recent times and students will notice at a number of points during first year courses in Contracts and Torts that it has become relatively blurred. Nevertheless, some classification is necessary simply in order to introduce manageability into the field of private obligation and the traditional approach at least fulfils this function.

The first prerequisite to contractual liability based on consent is that the parties must have reached an agreement. The enforcement by common law courts of contracts under the "classical" theory of contract is supported by the claim that courts are simply enforcing a mutual agreement freely consented to by each party to the contract. The idea of agreement also supports the view of contracts as a vehicle agreed to in advance for the planning of social relations among parties, including the facilitation of economic relationships important to a market economy. Requiring an agreement for contractual liability, however, opens up a series of further issues to be resolved. For example, to what extent need there be a single moment when the minds of the parties to the agreement should be in exact convergence, expressed in the notion of a *consensus ad idem*? How should parties manifest their consent to each other and to outsiders including the courts? In addressing whether an agreement exists, should courts address concerns about imperfect or incorrect information and unequal bargaining power? As Hugh Collins, *The Law of Contract*, 4th ed. (2003), at 59, has observed:

> To decide when consent has been given by both parties to a contract, the authors of traditional contract textbooks devised an intricate set of rules employing the concepts 'offer and acceptance' to fix the moment of responsibility. These rules typify the formalist qualities of classical law: they are detailed, technical, and mysterious, yet claim logical derivation from the idea of agreement. Judges quickly appreciated the rigour of this analytical framework, and in the nineteenth century they adopted most of the terminology from the textbooks.

The formal framework of offer and acceptance rules determines the existence of contractual agreement through a stylized sequence of actions. Ideally, agree-

ment would unfold through a sequence of events that match up to the formal categories of an offer, communication of the offer, an acceptance on the terms of the offer, and communication of the acceptance. Through these stylized requirements, contract law analysis determines that party behavior has crystallized in an agreement that could be the basis for a contract. However, commentators have often warned that the "rules" of offer and acceptance are merely tools of analysis to assist in defining the "moment of responsibility" rather than *a priori* statements to be blindly applied in a broad variety of circumstances. The recognition that the rules are merely tools should cause you to ask "tools to what ends?" How do the particular rules of offer and acceptance protect defensible policies, such as the freedom of contract of the offeror and the reliance and expectation interests of the offeree?

Courts increasingly acknowledge that a more flexible approach to determining when an agreement exists is required in practice to address the wide range of contracting situations and the varying policies raised by different situations. Some of the difficulties caused by moulding the principles of offer and acceptance in cases to which they do not readily apply are discussed by Fridman, "Making a Contract" (1988-89), Pitblado Lect. 2. In *New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co.*, [1975] A.C. 154 at 167 (P.C.), Lord Wilberforce observed:

> It is only the precise analysis of this complex of relations into the classical offer and acceptance, with identifiable consideration, that seems to present difficulty, but this same difficulty exists in many situations of daily life, *e.g.*, sales at auction; supermarket purchases; boarding an omnibus; purchasing a train ticket; tenders for the supply of goods; offers of rewards; acceptance by post; warranties of authority by agents; manufacturers' guarantees; gratuitous bailments; bankers' commercial credits. These are all examples which show that English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the slots of offer, acceptance and consideration.

These comments are equally applicable to modern Canadian law. Many of the rules of offer and acceptance are highly contextual, depending on an assessment of the language, conduct, and circumstances of the particular case. For example, a context of previous business and legal relations between parties might impact on the interpretation of whether the behavior of parties constitutes offer and acceptance; see the material on the "Battle of the Forms" as well as the decision in *Saint John Tug Boat Co. v. Irving Refinery Ltd.*, *infra*, in section 4 of this chapter. Furthermore, courts may stretch concepts of offer and acceptance to the point where a new rule arguably is created. In this respect, consider the rules for formation of unilateral contracts, such as in *Carlill v. Carbolic Smoke Ball Co.*, and the development of "two-contract" analysis in the Canadian law on tendering, as in *R. v. Ron Engineering & Construction (Eastern) Ltd.*, both *infra*, in section 2 of this chapter. Cases such as these stand as a warning against an excessive reliance on rigid formulations of the "rules" of contract formation.

The differences between formalist approaches and more contextual approaches are illustrated throughout this chapter. Consider the new scenarios that are presented for Canadian contract law by changing social and economic conditions. For example, do changing Canadian social values related to freedom to [illegible] based on race or class impact on the rules or application of the rules [illegible] and acceptance: *Christie v. York*, *infra*, in section 2 of this chapter?

Another context for Canadian contract law is the impact of increasing numbers of cross border transactions to which Canadians may be parties. Judgments from Canadian, Commonwealth and U.S. courts are included throughout this [illegible] to illustrate rules or debates that are relevant in all common law Canadian [illegible]tions. However, there are some differences in rules of offer and acceptance [illegible] different Canadian legal jurisdictions, as well as between Canadian and [illegible]anadian jurisdictions. For example, various notes in the chapter contrast [illegible]on Law contract principles with provisions of the Québec Civil Code, such [illegible] rules with respect to revocation of "firm" offers. Such comparisons show [illegible] current common law rules on offer and acceptance are not the only options [illegible] a range of reasonable alternatives. Furthermore, such contrasting comparative laws hint at the complexity of contractual situations with connections to [illegible] than one legal jurisdiction. Efforts to find some common international rules [illegible]gh international treaties are evidenced with respect to some kinds of contracts [illegible] United Nations Convention on Contracts for the International Sale of Goods, [illegible]ed to in the notes and implemented in all Canadian jurisdictions. Often, [illegible], common international rules are lacking, and determination of the applicable rules of contract and the relevant courts to resolve contractual disputes [illegible] on navigating the often challenging rules of private international law; see [illegible] 5 of this chapter.

Lastly, consider the impact on contract formation of the changing technological setting for modern transactions. In light of the enormous amount of trade [illegible] conducted by almost instantaneous means of communication such as facsimile, e-mail and the Internet and World Wide Web, contrast the approach to the [illegible] and place of formation of contract that the common law courts adopt in [illegible] *Ltd.* and *Rudder v. Microsoft Corp.*, *infra*, section 5(a) of this chapter, with the approach taken towards contracts formed by correspondence in the 19th century cases in sections 5(b) and 6. Various notes in this chapter also consider the legislative response towards contract formation found in e-commerce legislation in Canadian jurisdictions.

1. Offer and Invitation to Treat

CANADIAN DYERS ASSOCIATION LTD. v. BURTON

(1920), 47 O.L.R. 259 (H.C.)

MIDDLETON J. The question argued was whether, upon the correspondence discussed, a contract had been made out.

There can be no doubt of the elementary principle that there can be no contract of sale unless there can be found an offer to sell and an acceptance of the offer, or an offer to purchase and an acceptance of that offer. A mere quotation of price does not constitute an offer to sell to the person to whom the quotation is addressed. It is no more than an invitation to him to make an offer to buy at that

This case was followed in *Clark Agri Service Ltd. v. 705680 Ontario Ltd. (c.o.b. Glen Elev...* (1996), 2 C.P.C. (4th) 78 (Ont. Gen. Div.), in which an offer to settle a property dispute, ... revoked by being replaced with a second offer, was terminated when a tornado damaged the pro...

FORMATION OF THE AGREEMENT: CERTAINTY OF TERMS

Introduction

The theory that the existence of a contract is based upon the mutual acceptance of reciprocal obligations is premised on the assumption that it is possible to determine what those obligations are. Hence one of the requirements of a contract's formation is that its terms define the parties' obligations with certainty. The theme that underlies the body of law associated with the requirement of certainty is fundamentally the same as that underlying the principles of offer and acceptance. Both address the question of whether the parties are truly in agreement, that is, whether they share an unambiguous understanding of their respective rights and obligations. To express the point in more elegant and traditional terms, the question is whether the parties have achieved *consensus ad idem*. If the answer is no, the parties may have made an agreement, but it is not a contract.

As we saw in the last chapter, a purported acceptance of an offer to contract that departs materially from the terms of the offer is not effective; no contract arises from the parties' exchange. That is so because the offeror has expressed a willingness to proceed under one set of right and obligations, but the offeree has expressed a willingness to accept rights and obligations that differ in one or more respects from those contemplated by the offeror. They have not agreed to the same thing.

Frequently, however, the parties' respective positions as to the terms of their agreement are not manifested by the sequential sort of exchange generally associated with issues of offer and acceptance. Rather, we are presented with what purports to be a complete agreement, but one in which the obligations the parties have mutually accepted as comprising its content are not in all respects clear. The difficulty is not that the parties have apparently agreed to different things, but that they have not reached agreement at all on one or more material points of the contemplated transaction or relationship or, in some instances, that it is not possible to determine from the words used what they have agreed. Of course, if the matter becomes the subject of litigation, one of the parties will invariably assert that agreement *has* been reached, on the basis of a proffered explanation of what the words used were intended to mean. The party resisting enforcement of the agreement will argue not only that the words as interpreted by the other party do not represent what the parties agreed, but that it is impossible to draw from them *any* conclusion about the basis upon which the matter in issue is to

proceed. If it is not possible to identify the terms upon which the parties have agreed, there can be no contract.

The terminology employed in connection with problems of uncertainty in the context of contract formation can be deceptive. Lawyers, judges and commentators often discuss the issue in terms of whether there is an "enforceable" contract between the parties, or whether a contract is "void" for uncertainty. This language is misleading, since it suggests that a contract exists, but that it cannot be enforced because its terms are not certain. Notwithstanding such language, the real subject of discussion is whether a contract has come into existence at all. The question is not one of contract enforcement, but one of contract formation.

Although the problem of uncertainty relates to contract formation rather than contract enforcement, it is helpful to keep in mind the relationship between these two dimensions of contract doctrine when considering cases that raise this issue. The conclusion that a contract is "enforceable" means that if one of the parties "breaches" the contract by failing to perform the obligation imposed by the term breached, the law offers a "remedy" to the other party or parties. The remedy awarded by the court is ordinarily a directive that the party in breach pay monetary compensation for the breach (an award of "damages"). In limited circumstances the court may direct that the party in breach actually perform the contractual obligation in question (an award of "specific performance"). The sum of money to which a party seeking enforcement is entitled by way of damages is designed to put him or her in the position he or she would have been in had the other party's contractual obligations been fulfilled. Therefore, in order to grant a remedy, it must be possible to define precisely what it is that the party in breach was obliged to do under the contract. If it is not possible to determine that question by reference to the terms of the parties' agreement, no basis exists for the award of a remedy for breach of contract; hence it may be untenable to maintain that there *is* a contract. Accordingly, a court is likely to be influenced in deciding whether an agreement is sufficiently certain to be regarded as a contract by the question of whether its terms allow for determination of the sum of money that appropriately compensates for non-performance by one of the parties. The subject of contract remedies is discussed in Chapter 14.

The intention of parties to an agreement is relevant to the question of whether the terms used are sufficiently certain to support a contract in two respects. If there is a degree of uncertainty in the terms of an agreement, the court will not attempt to resolve that uncertainty in aid of the conclusion that the agreement is a contract unless it is clear that the parties intended to contract; that is, that they intended to create mutually binding and enforceable obligations. Secondly, the exercise of determining whether the terms of the agreement define the parties' obligations with sufficient certainty depends upon ascertaining the parties' intention as to the meaning of the language used. In the law of contract, the determination of intention is ordinarily approached objectively. The issue is not what each of the parties actually intended (a subjective approach), but rather what they must reasonably be viewed as having intended given the language used and the circumstances and aim of the transaction (an objective approach). As you read the cases in this chapter, consider whether the courts have used an objective or a [illegible] approach in determining whether the terms of an agreement clearly [illegible] the parties' shared intention as to their respective obligations.

[illegible] of an objective standard to give content to the language of agreement [illegible] the contracting process, in that it allows for determination of the parties' [illegible] obligations notwithstanding a certain degree of ambiguity in the words [illegible] which they have expressed their intention. The fact that one party denies [illegible] advanced by the other as to the meaning and clarity of the terms used [illegible] precludes a finding that agreement was reached. However, the courts are [illegible] anxious to ensure that they do not improperly impose obligations that [illegible] did not intend to assume by finding an agreement on terms to which [illegible] did not assent. The judicial "filling in of the blanks" in the language of [illegible] based on what the parties must reasonably be presumed to have in- [illegible] may facilitate the conclusion of a contemplated transaction. However, if [illegible] far, it may impose a contractual liability to which one or both of the [illegible] had no intention of being exposed. Accordingly, there is a tension between [illegible] the reasonable expectations of parties by giving effect to their agreement, [illegible] deficiencies in its expression, and defeating their reasonable [illegible] by imposing an agreement that was not intended.

[illegible] headings below loosely categorize the various objections to enforce- [illegible] The common theme is the argument that, because the terms fail to define [illegible] obligations of the parties, a contract has not been formed. Though [illegible] assists in the analysis of these cases, there is no bright line between [illegible] This is particularly true in connection with the cases considered in sections [illegible] through 5, in which the question raised is whether parties whose agreement [illegible] a further course of negotiation to finalize identified terms of a [illegible] have succeeded in creating enforceable obligations through the vehicle [illegible]

1. Vagueness

R. v. CAE INDUSTRIES LTD.

[illegible] D.L.R. 129, [1985] 5 W.W.R. 481, 30 B.L.R. 236, 20 D.L.R. (4th) 347, 61 [illegible] (F.C.A.), leave to appeal to S.C.C. refused (1985), 20 D.L.R. (4th) 347n

[illegible] negotiations took place between the Government of Canada and the respon- [illegible] about the possibility of the respondent taking over and running an aircraft [illegible] base no longer required by Air Canada. In March 1969, the following [illegible] was written and signed by three ministers:

THE MINISTER OF TRANSPORT

OTTAWA, March 26, 1969.

[illegible] D. Reekie,
[illegible]
[illegible] Industries Ltd.
[illegible] Box 6166,
Montreal 3, P.Q.

THE ENFORCEMENT OF PROMISES

1. Introduction and Study Guide

> So far as human history has gone, the fact is that we do not wish to enforce all promises and the courts have not enforced all promises.
>
> (Corbin, *Contracts* (1963), at 495)

Every society must decide which agreements it will enforce through the legal system and which agreements result in commitments that are binding only as a matter of honour or morality. This issue can be illustrated by taking a number of examples and asking whether they are, or should be, legally enforceable. Consider the following situations:

(i) A promises to meet B for dinner at 8 p.m. at a favourite restaurant;

(ii) A promises to donate $100 per month to the local United Way campaign;

(iii) A orally agrees to purchase B's business for $100,000;

(iv) B, a contractor, has promised to renovate A's home for the price of $50,000 and to complete the renovations before July 1st. In June, A notices that B is behind schedule and promises the contractor an extra $5,000 if B succeeds in completing the renovations before July 1st.

The previous chapters dealt with whether the parties had reached an agreement and whether the agreement was complete. This chapter is concerned with the criteria which courts employ to determine which of these agreements amount to enforceable contracts. Different legal systems apply different criteria to this basic question, even in the face of similar economic systems. For example, formal contract doctrine in Québec and the United States suggests that the courts in those jurisdictions would reach results in some of the situations set out above that differ from the results that would be achieved under the traditional approach to the common law.

In reading the first case in this chapter, *Dalhousie College v. Boutilier Estate*, it is instructive to ask what theories of liability the Supreme Court of Canada could have applied to decide whether Arthur Boutilier's promise to give money to Dalhousie was legally binding. Would any of those theories have achieved a result that differed from the one finally reached by the court? What was the significance to the court of the following factors in determining the possible liability of the estate?

(a) FORMALITY

The donor's promise was in writing, signed and dated. Because these [illegible] formalities were observed, we can be reasonably certain that the donor made the promise and knew what he was doing.

It is often the hallmark of less developed legal systems that promises are legally enforceable only if they satisfy certain basic formalities. For example, at one stage in Roman Law, the donor would have been legally bound by even a verbal pledge if precise language had been used. If, in a case like *Dalhousie College*, a Roman university president had said "Do you solemnly promise (spondesne) to pay $5,000 to the university" and if the donor had replied "I solemnly promise (spondeo)," the donor's promise would have been legally binding. The use of these words may indicate that this form of contracting was based on the idea of a solemn oath.

This early example illustrates a problem with any requirement which states that a contract will be formed if and when the parties observe certain formalities. At least in early Roman law, there was no contractual obligation unless the parties used the precise words required. Because any slip of the tongue could dash the parties' plans, Roman law shows a history of development which first allowed a list of different (but still restricted) verbs to be used, until in the last years of the Empire, a statutory change allowed any expression of the appropriate intention to create this type of contract.

Even in modern times, popular reaction to the question of which agreements should be legally enforced often reflects a variation of the formality test. A person on the street may suggest that the donor's promise should be enforceable "because it is in writing". It would certainly be possible to require that only written promises should be enforceable, but what would be the effect of such a requirement?

There are more general reasons for requirements of formality, such as writing. They were examined by Fuller in "Consideration and Form" (1941), 41 Col. L.R. 799 and synthesized as follows by the Ontario Law Reform Commission in its Report on the Amendment of the Law of Contract (1987) at 95:

> (1) *Evidentiary function.* This function is self-evident and, judging by the preamble to the *Statute of Frauds*, obviously weighed most heavily with the framers of the Statute in 1677. Writing not only avoids the risks of perjury but, more importantly, by providing an objective and permanent record of the parties' agreement, avoids reliance on fallible human memories and eliminates the need to weigh possibly conflicting evidence as to what was said and with what intention.
>
> (2) *Cautionary function.* The danger of parol agreements that are fully enforceable without being reduced to writing, it is said, is that they may result in imposing very significant obligations without the parties fully appreciating the consequences of their actions. A writing requirement introduces a note of deliberation and provides the parties with a period of reflection, thereby, it is argued, preventing unconsidered action. Equally important, a writing requirement provides the parties with a shield behind which they may safely negotiate without the threat of being deemed to have concluded a binding contract.
>
> (3) *Channelling function.* . . . [A] legal formality such as writing not only serves an evidentiary and cautionary function, but "serves also to mark or signalize the enforceable promise; it furnishes a simple and external test of enforceability." However, Professor Fuller also recognized that the requirements of the *Statute of Frauds* serve only a negative effect—they indicate which promises are not enforceable without written evidence, but they do not [illegible] the writing with the cachet of conclusive validity and effectiveness. This is because the written promise may be void or unenforceable for lack of consideration, lack of capacity, or because of duress, fraud, or other vitiating factors.

[footnotes omitted.]

A brief consideration of all the unwritten but enforceable contracts that we make, including those illustrated in Chapter 2, such as *Pharmaceutical Society* [illegible], demonstrates that the common law does not insist on formalities as a prerequisite to legal liability. Section 7 of this chapter shows that historically certain types of promises were always binding if they were made in a particularly formal manner. Section 8 also demonstrates that the test of formality has had a lasting appeal, because in most Canadian jurisdictions certain promises which [illegible] considered socially important still must be in writing in order to be legally enforceable.

(b) SERIOUSLY INTENDED PROMISES

Some of the central ideas of contract are derived from the institution of promise. As a matter of basic morality, we expect that promises should be kept and it would not be outrageous to say that promises create legal, as well as moral obligations.

A different but related theory would emphasize that perhaps not all promises should be legally binding, but that promises should create legal obligations if they are seriously intended and made for a good reason.

It is probably fair to characterize the donor's promise in *Dalhousie College* as seriously intended and inspired by a good reason. If so, why did this not matter to the Supreme Court of Canada? The result of the case clearly allows the promisor to revoke a freely made and serious promise. Yet, even within Canada, one judge stated in another case before the Supreme Court of Canada that the civil law system of Québec allows promises similar to that of the donor in *Dalhousie College* to be enforced (see *Ross, Re* (1931), [1932] S.C.R. 57, *per* Newcombe J. at p. 68-70).

The Civil Code of Québec, Book 5, Title 1, Chapter 1, provides:

> Art. **1371.** It is of the essence of an obligation that there be persons between whom it exists, a prestation which forms its object, and, in the case of an obligation arising out of a juridical act, a cause which justifies its existence.
>
> Art. **1410.** The cause of a contract is the reason that determines each of the parties to enter into the contract.
>
> The cause need not be expressed.

The basic concept of *cause* is well discussed in Castel, *The Civil Law System of the Province of Quebec* (1962), at 298-328. Castel's account is an excellent introduction to *cause*. Common law readers may be amused by his comment (at 313) that *cause*, as construed in French doctrine, has 2 defects: "(1) it is false, at least in 2 cases out of 3; (2) it is useless." These views also reflect the tone of many of the common law doctrine of consideration.

Although it is dangerous to attempt a nutshell definition of a complex concept, for introductory purposes, the concept of "cause" has been described as

requiring that "there must be a valid purpose, a reason for, an end to be pursued in the contract". Pollard, *Sourcebook on French Law* (1996) at 193. In the *Rose Re* decision, Newcombe J., at 68, noted that charitable intention can constitute "cause" when he quoted from an edition of the French jurist Pothier:

> Dans les contrats de bienfaisance, la liberalité que l'une des parties veut exercer envers l'autre est une cause suffisante de l'engagement qu'elle contracte envers elle.

As you read the materials in this chapter, especially cases such as *Eastwood v. Kenyon*, *Foakes v. Beer* and *Gilbert Steel v. University Construction*, ask yourself how judges in the 19th and the first portion of the 20th century might have reacted to the argument that a promise that was freely made and intended to be binding should be legally enforceable. You may wish to continue with this inquiry in Chapter 5, when you read *Tweddle v. Atkinson*, *Dunlop v. Selfridge* and *Beswick v. Beswick*.

After you have read the entire chapter, ask yourself whether the judges who decided cases such as *Ron Engineering* (in Chapter 2, section 2), *Pao On v. Lau Yiu Long*, *Williams v. Roffey Bros.* and *Robichaud c. Caisse Populaire* would respond to the same question. How does the attitude of the judges in these cases compare with those of their predecessors? Even if the notion of serious intention has not received much formal recognition in the common law approach to enforcing promises, what role has it played in the development of promissory estoppel?

For further reading, some of the lessons to be drawn from the civilian experience are analyzed by Chloros, "The Doctrine of Consideration and the Reform of the Law of Contract" (1968), 17 Int. & Comp. L.Q. 137.

(c) RELIANCE

In the *Dalhousie College* case, the university argued that it made increased expenditures on the strength of the fund-raising campaign in which the donor had made his pledge. In other cases, the reliance of the promisee may be far more explicit and direct. For example, in situation (iv) set out at the beginning of this section, the contractor may have hired more workers and worked longer hours in order to achieve the July 1st completion date for the renovations.

The legal system might well choose to enforce certain promises because of reliance on the part of the promisee. Indeed, in an article entitled "The Reliance Interest in Contract Damages", which is extracted in Chapter 14, section 2, Professors Fuller and Perdue point out that a person who has actually relied on a promise has a particularly pressing claim for relief. Perhaps as a result, the American Restatement of Contracts (2d) 1979, states in para. 90:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

In contrast to a theory which is based upon the serious nature of the promise, the legal obligation in the reliance theory results not from the fact of the promise or from its serious intention, but from its effect on the promisee.

How far was traditional common law doctrine concerned with reliance in cases such as *Gilbert Steel* and *Foakes v. Beer*? What was the courts' explanation in these cases for finding that the mere reliance of the promisee was an insufficient reason to enforce the promise?

Finally, when you have completed the entire chapter, you may wish to ask how far a theory based on reliance is reflected in the doctrine of promissory estoppel. To what extent does the Canadian version of the doctrine suggest conclusions that differ from those that would be reached under para. 90 of the American Restatement?

(d) EXCHANGE AND BARGAINS

The *Dalhousie College* case shows how the common law did not explicitly adopt the first three theories outlined in this section. What test did the Supreme Court articulate in their place for determining which promises should be enforced? In insisting upon the existence of consideration, the common law emphasized that contracts were primarily about exchanges or bargains, in which an act or promise was given by the promisee in consideration of the original promise.

There have been many attempts to define "consideration" of which the following are, perhaps, the most often quoted. *Currie v. Misa* (1875), L.R. 10 Exch. 153 (Eng. Exch.) at 162:

> A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.

This statement was adopted in *Spruce Grove (Town) v. Yellowhead Regional Library Board* (1982), 143 D.L.R. (3d) 188 (Alta. C.A.).

Pollock, *Principles of Contract*, 13th ed. (1950), at 133:

> An act of forbearance of the one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

American Restatement of Contracts (2d), 1979:

> 71.(1) To constitute consideration, a performance or a return promise must be bargained for.
>
> (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
>
> (3) The performance may consist of
>
> (a) an act other than a promise, or
> (b) a forbearance, or
> (c) the creation, modification or destruction of a legal relation.

The origins of the doctrine of consideration are controversial. Some describe consideration as an historical accident, a legacy of the old forms of action, while others see it as reflecting a free market economy and a commercial society. See, e.g., Fuller, "Consideration and Form" (1941), 41 Colum. L. Rev. 799 at 814-15 for a functional defence of the doctrine of consideration, and Posner, "Gratuitous Promises in Economics and Law" (1977), 6 J. of Legal Stud. 411 for an economic analysis.