

# Table of Contents

## CHAPTER 1. THE LEGAL IDEA OF CONTRACT

### I. WHAT IS CONTRACT?

- § 1:1 Generally
- § 1:2 Contract and Promise
- § 1:3 Contract and Agreement
- § 1:4 Contract and Exchange

### II. CONTRACT AND OTHER LEGALLY RECOGNIZED OBLIGATIONS

- § 1:5 Contract and Tort
- § 1:6 Contract and Unjust Enrichment
- § 1:7 Contract and Equity

### III. THEORIES OF CONTRACT LAW

- § 1:8 Generally
- § 1:9 Unitary Theories of Contract Law
- § 1:10 External Justifications of Contract Law

## CHAPTER 2. AGREEMENT

### I. *CONSENSUS AD IDEM*

- § 2:1 Generally
- § 2:2 Bilateral and Unilateral
- § 2:3 —Bilateral
- § 2:4 —Unilateral

### II. OFFER

- § 2:5 Definition
- § 2:6 Invitation to Treat
- § 2:7 —Advertisements, Catalogues, Displays: the General Rule
- § 2:8 —Exceptions
- § 2:9 —Calls for Tenders
- § 2:10 — —*Harvela*: a Solution Without an Explanation
- § 2:11 — —*Ron Engineering*: Contract A—Contract B
- § 2:12 — —The Nature and Scope of *Ron Engineering*
- § 2:13 Communication of Offer
- § 2:14 Revocation of Offer
- § 2:15 —Unilateral Contracts—Pre-Emptive Revocation
- § 2:16 —Unilateral Contracts—Communication of Revocation

- § 2:17 Lapse of Offer
- § 2:18 —Death

### **III. ACCEPTANCE**

- § 2:19 Definition
- § 2:20 Post-“Acceptance” Negotiations
- § 2:21 Counter-Offer
- § 2:22 Battle of the Forms
- § 2:23 —Last Shot Rule
- § 2:24 —Reconciliation and Implication
- § 2:25 —Uniform Commercial Code § 2-207
- § 2:26 Performance and Motive under Unilateral Contracts
- § 2:27 Communication of Acceptance
- § 2:28 —Silence
- § 2:29 —Waiver of Notification
- § 2:30 — —Unilateral Contract
- § 2:31 — —Bilateral Contract
- § 2:32 —Communication at Distance
- § 2:33 — —Instantaneous Communications—the General Rule
- § 2:34 — —Non-Instantaneous Communications—the Postal Acceptance Rule
- § 2:35 — —Electronic Contracts
- § 2:36 — —Electronic Commerce Legislation

### **IV. CERTAINTY OF TERMS**

- § 2:37 Generally
- § 2:38 Vague Terms
- § 2:39 Missing Terms
- § 2:40 Agreement to Agree
- § 2:41 Anticipated Formalization
- § 2:42 —Executory Agreements
- § 2:43 —Executed Agreements

## **CHAPTER 3. INTENTION TO CONTRACT**

### **I. INTRODUCTION**

- § 3:1 Generally

### **II. COMMON INDICATORS**

- § 3:2 Preliminary Agreements
- § 3:3 Informally Expressed Agreements
- § 3:4 Dealings with the Government
- § 3:5 Social and Domestic Arrangements
- § 3:6 Voluntary and Religious Associations
- § 3:7 Commercial Agreements

TABLE OF CONTENTS

**CHAPTER 4. CONSIDERATION**

**I. IMPORTANCE AND MEANING**

§ 4:1 Importance

§ 4:2 Meaning

**II. REQUEST AND MUTUALITY**

§ 4:3 Request

§ 4:4 Mutuality

§ 4:5 —Firm Offers and Charitable Subscriptions

**III. SUFFICIENCY**

§ 4:6 Adequacy and Sufficiency Contrasted

§ 4:7 Forbearance to Sue

§ 4:8 Existing Obligation

§ 4:9 —Promises to Perform an Existing Public Duty

§ 4:10 —Promises to Perform an Existing Contractual Duty to the Same Promisee

§ 4:11 — —Modification of Employment Contracts

§ 4:12 —Promises to Pay an Existing Debt

§ 4:13 —Promises to Perform an Existing Contractual Duty Owed to a Third Party

**IV. PAST CONSIDERATION**

§ 4:14 Past Consideration

**V. LEGALITY**

§ 4:15 Legality

**VI. SOURCE**

§ 4:16 Source

**VII. PROOF**

§ 4:17 Express

§ 4:18 Implied

**VIII. EXCEPTIONS**

§ 4:19 Contracts Under Seal

§ 4:20 Statutory Changes

**CHAPTER 5. PROMISSORY ESTOPPEL**

**I. WHAT IS PROMISSORY ESTOPPEL?**

§ 5:1 Generally

§ 5:2 Distinction From Other Doctrines

## **II. REQUIREMENTS OF PROMISSORY ESTOPPEL**

- § 5:3 Generally
- § 5:4 Existing Legal Relationship
- § 5:5 Clear Promise or Assurance
- § 5:6 Intention to be Bound
- § 5:7 Reliance
- § 5:8 Detriment

## **III. A DEFENCE TO PROMISSORY ESTOPPEL**

§ 5:9 Generally

## **IV. ESTOPPEL AS A CAUSE OF ACTION**

- § 5:10 Generally
- § 5:11 United States
- § 5:12 Australia
- § 5:13 What's Next for Canada?

# **CHAPTER 6. CAPACITY**

## **I. CONTRACTUAL CAPACITY, AND CONTRACTS WITH A COMMON PARTY**

- § 6:1 Contractual Capacity
- § 6:2 Contracts with a Common Party

## **II. INCAPACITIES OF NATURAL PERSONS**

### **A. MINOR PERSONS**

#### **1. Overview**

§ 6:3 Generally

#### **2. Provinces Other than British Columbia**

- § 6:4 Effect of the Law
- § 6:5 Enforceable Contracts—Necessaries
- § 6:6 —Contracts of Service
- § 6:7 —Beneficial Contracts
- § 6:8 Voidable Contracts—Those Valid unless Repudiated
- § 6:9 —Those Invalid unless Ratified
- § 6:10 Void Contracts
- § 6:11 Consequences of Invalid Contracts—General
- § 6:12 —Voidable Contracts
- § 6:13 —Void Contracts
- § 6:14 Alternate Liability in Tort
- § 6:15 Liability of Adult Guarantor or Surety

TABLE OF CONTENTS

3. British Columbia

§ 6:16 Generally

**B. INCOMPETENT PERSONS**

§ 6:17 Effect of Incompetence

§ 6:18 Relevant Factors—Knowledge of Other Party

§ 6:19 —Fairness

§ 6:20 Liability for Necessaries

**C. INTOXICATED PERSONS**

§ 6:21 Voidability of Contracts

§ 6:22 Ratification

**D. THE ELDERLY AND THE DISABLED**

§ 6:23 Generally

**III. ARTIFICIAL PERSONS**

§ 6:24 Introduction

§ 6:25 The Crown—Formalities

§ 6:26 —Enforcement

§ 6:27 Business Corporations—Powers

§ 6:28 —Formalities

§ 6:29 Municipal Corporations

**IV. UNINCORPORATED ASSOCIATIONS**

§ 6:30 Generally

§ 6:31 Trade Unions—At Common Law

§ 6:32 —Under Statute

**CHAPTER 7. PRIVITY**

**I. THE DOCTRINE OF PRIVITY**

§ 7:1 What is Privity?

§ 7:2 The Development of the Doctrine

§ 7:3 The Case Against Privity

§ 7:4 —History and Theory

§ 7:5 —Intention

§ 7:6 —Injustice

§ 7:7 —Commercial Reality

§ 7:8 —Exceptions, Complexity, and Proof of Injustice

§ 7:9 —Idiosyncrasies

§ 7:10 Privity and Consideration

§ 7:11 Joint and Several Parties

§ 7:12 Contracts under Seal

## **II. MODIFICATIONS AND QUALIFICATIONS OF THE DOCTRINE**

- § 7:13 Introduction
- § 7:14 Trust
- § 7:15 Bailment
- § 7:16 Agency—General
- § 7:17 —Agency and Exclusion Clauses
- § 7:18 The Principled Exception
- § 7:19 —Intention to Extend the Benefit to the Third Party—  
Interpretation
- § 7:20 — —Subsequent Deletion or Modification
- § 7:21 — —Prior Existence
- § 7:22 —Performing the Very Activities Contemplated
- § 7:23 —Scope of the Principled Exception
- § 7:24 Negotiable Instruments and Irrevocable Letters of Credit
- § 7:25 Statute
- § 7:26 Restrictions on Chattels
- § 7:27 Future Developments: Third Party Standing

## **CHAPTER 8. WRITING**

### **I. THE STATUTE OF FRAUDS**

#### **A. ORIGINS**

- § 8:1 Generally

### **II. SCOPE**

- § 8:2 Generally
- § 8:3 Contracts of Guarantee
- § 8:4 Contracts for Sale of Land or any Interest in Land
- § 8:5 Contracts Not to be Performed Within a Year
- § 8:6 Other Contracts

### **III. WRITING REQUIREMENTS**

- § 8:7 General
- § 8:8 The Contents of the Note or Memorandum
- § 8:9 The Form of the Note or Memorandum
- § 8:10 The Signature

### **IV. THE EFFECT OF NON-COMPLIANCE**

- § 8:11 At Common Law
- § 8:12 In Equity

### **V. THE SALE OF GOODS ACT**

- § 8:13 The Current Provisions

TABLE OF CONTENTS

- § 8:14 The Scope of the Current Provisions
- § 8:15 Requirements—General
- § 8:16 —Acceptance
- § 8:17 —Earnest or Part Payment
- § 8:18 —A Note or Memorandum

**VI. OTHER STATUTES**

- § 8:19 Generally

**CHAPTER 9. MISTAKE**

**I. MISTAKE AT COMMON LAW AND IN EQUITY**

- § 9:1 Generally

**II. UNILATERAL MISTAKE**

- § 9:2 Generally
- § 9:3 Unilateral Mistake in Motive
- § 9:4 Unilateral Mistake in Terms: Snapping Up
- § 9:5 Mistake of Identity
- § 9:6 *Non Est Factum*

**III. BILATERAL MISTAKE**

- § 9:7 Mutual Mistake About Terms
- § 9:8 Common Mistake in Fundamental Assumptions
- § 9:9 —Mistaken Assumptions About the Existence of the Contract's Subject-Matter
- § 9:10 —Mistaken Assumptions About Legal Ownership
- § 9:11 —Mistaken Assumptions About Quality at Common Law
- § 9:12 —Mistaken Assumptions About Quality in Equity
- § 9:13 —The Assumption of Risk

**CHAPTER 10. MISREPRESENTATION**

**I. CLASSIFICATION OF PRE-CONTRACTUAL STATEMENTS**

- § 10:1 Generally
- § 10:2 The Basis for Classification
- § 10:3 Mutually Exclusive Categories?

**II. MISREPRESENTATIONS: ELEMENTS**

- § 10:4 Generally
- § 10:5 Statement
- § 10:6 —Silence
- § 10:7 —Duty to Disclose
- § 10:8 Statement of Fact

- § 10:9 —Prediction
- § 10:10 —Opinion
- § 10:11 —Law
- § 10:12 —Fraudulent Predictions, Opinions, and Statements of Law
- § 10:13 False Statement
- § 10:14 Material
- § 10:15 —Intended Reliance
- § 10:16 Actual Reliance
- § 10:17 —Presumption of Reliance

### **III. TYPES OF MISREPRESENTATIONS**

- § 10:18 Generally
- § 10:19 Fraudulent Misrepresentations

## **CHAPTER 11. DURESS, UNDUE INFLUENCE, AND UNCONSCIONABILITY**

### **I. INTRODUCTION**

- § 11:1 Generally

### **II. DURESS**

- § 11:2 Duress to the Person
- § 11:3 Extension of Duress at Common Law
- § 11:4 Economic Duress

### **III. UNDUE INFLUENCE**

- § 11:5 Generally

### **IV. UNCONSCIONABILITY**

- § 11:6 The Traditional View
- § 11:7 Inequality in Bargaining Power
- § 11:8 The Canadian Approach
- § 11:9 The Scope of Relief
- § 11:10 The Utility and Disutility of the Doctrine of Unconscionability
- § 11:11 Legislation on Unconscionable Conduct—Introduction
- § 11:12 —Transactions to Lend Money
- § 11:13 —Unfair Business Practices

## **CHAPTER 12. ILLEGALITY AND PUBLIC POLICY**

### **I. INTRODUCTION**

- § 12:1 Generally



TABLE OF CONTENTS

**II. STATUTORY ILLEGALITY**

**A. PROHIBITION BY STATUTE: INTRODUCTION**

§ 12:2 Generally

**B. EXPRESS AND IMPLIED PROHIBITIONS**

§ 12:3 In General

§ 12:4 Construction

§ 12:5 Policy

§ 12:6 The *Still* Case

**C. ILLEGAL PERFORMANCE**

§ 12:7 Generally

**III. COMMON LAW ILLEGALITY**

§ 12:8 The Doctrine of Public Policy

§ 12:9 Contracts to Commit Illegal Acts

§ 12:10 Contracts that Interfere with the Administration of Justice

§ 12:11 Contracts Injurious to the State

§ 12:12 Contracts which Involve or Encourage Immorality

§ 12:13 Contracts Affecting Marriage

§ 12:14 Contracts in Restraint of Trade

**IV. THE CONSEQUENCES OF ILLEGALITY**

§ 12:15 Voidness of Transaction

§ 12:16 The Doctrine of Severance

§ 12:17 Recovery Despite Illegality—Exceptions to the Strict Doctrine

§ 12:18 —Independence of Action

§ 12:19 —Repentance

§ 12:20 —Parties not Equally in Fault

**CHAPTER 13. CONDITIONS PRECEDENT**

§ 13:1 The Transformation of Conditions Precedent

§ 13:2 The Effect of True Conditions Precedent

§ 13:3 Waiver

§ 13:4 Obligations Under True Conditions Precedent

**CHAPTER 14. TERMS**

**I. EXPRESS TERMS**

§ 14:1 Definition

§ 14:2 Statements That are Terms

§ 14:3 The Interpretation of Express Terms

§ 14:4 The Parol Evidence Rule

§ 14:5 Admissible Parol Evidence

- § 14:6 The Canons of Construction for Written Documents
- § 14:7 A Revised Approach to Interpretation
- § 14:8 Alteration of Documents

## **II. IMPLIED TERMS**

- § 14:9 The Possibility of Implication
- § 14:10 The Doctrine of Business Efficacy
- § 14:11 Previous Dealings
- § 14:12 Usage and Custom
- § 14:13 Under Statute
- § 14:14 The Theory of Implied Terms

## **III. VARIETIES OF TERMS**

- § 14:15 The Condition-Warranty Dichotomy—Introduction
- § 14:16 —Conditions
- § 14:17 —Warranties
- § 14:18 —Innominate or Intermediate Terms

# **CHAPTER 15. EXCLUSION CLAUSES**

## **I. FUNCTION AND EFFECT**

- § 15:1 Generally

## **II. CRITERIA FOR ENFORCEABILITY**

- § 15:2 Notice
- § 15:3 Scope

## **III. THE *TERCON* APPROACH**

- § 15:4 Generally

# **CHAPTER 16. COLLATERAL CONTRACTS**

## **I. DEFINITION**

- § 16:1 Generally

## **II. BENEFITS**

- § 16:2 Generally
- § 16:3 Privity of Contract
- § 16:4 Revocation of Offers of Unilateral Contracts
- § 16:5 Illegality
- § 16:6 Statute of Frauds
- § 16:7 Parol Evidence Rule

## **III. REQUIREMENTS**

- § 16:8 Generally

TABLE OF CONTENTS

- § 16:9 Contractual Intention
- § 16:10 Clear and Certain Terms
- § 16:11 Consideration
- § 16:12 No Contradiction
- § 16:13 —The Trilogy
- § 16:14 —Criticisms of the Trilogy

## **CHAPTER 17. PERFORMANCE**

### **I. THE DUTY TO PERFORM**

- § 17:1 Strict Performance
- § 17:2 Contractual Qualifications of Strict Performance—Manner of Performance
- § 17:3 —Time of Performance
- § 17:4 —Anticipatory Agreement

### **II. DEPENDENCY OF PERFORMANCE**

- § 17:5 Dependent Obligations—Conditional and Concurrent Obligations
- § 17:6 —Entire Obligations
- § 17:7 Independent Obligations
- § 17:8 Substantial Performance

### **III. ALTERNATIVES TO PERFORMANCE**

- § 17:9 Introduction
- § 17:10 Tender
- § 17:11 Waiver
- § 17:12 Discharge and Modification by Subsequent Agreement—Variation
- § 17:13 —Novation
- § 17:14 —Accord and Satisfaction
- § 17:15 —Merger

## **CHAPTER 18. GOOD FAITH**

### **I. OVERVIEW**

- § 18:1 Generally

### **II. THE TRADITIONAL APPROACH**

- § 18:2 Generally

### **III. THE GENERAL ORGANIZING PRINCIPLE OF GOOD FAITH PERFORMANCE**

- § 18:3 Generally

### **IV. PARTICULAR DUTIES**

- § 18:4 Good Faith Duties Predating *Bhasin*

- § 18:5 —Duties Arising from Specific Circumstances—Cooperation  
Required to Achieve Objects
- § 18:6 — —Discretionary Power
- § 18:7 — —Evasion of Duties
- § 18:8 —Duties Arising from Specific Relationships—Employment  
Contracts
- § 18:9 — —Insurance Contracts
- § 18:10 — —Tendering
- § 18:11 Duties Arising from the *Bhasin* Analysis—Honest  
Performance

## **CHAPTER 19. BREACH**

### **I. VARIETIES OF BREACH AND DISCHARGE BY BREACH**

- § 19:1 Varieties of Breach
- § 19:2 Discharge by Breach

### **II. ANTICIPATORY BREACH**

#### **A. DEFINITION AND ELEMENTS**

- § 19:3 Definition
- § 19:4 What Amounts to Repudiation?
- § 19:5 Must be Wrongful
- § 19:6 Acceptance of Repudiation

#### **B. CONSEQUENCES**

- § 19:7 The Effects of Acceptance of Repudiation
- § 19:8 Where Repudiation Is Not Accepted

## **CHAPTER 20. IMPOSSIBILITY AND FRUSTRATION**

### **I. IMPOSSIBILITY**

- § 20:1 Physical Impossibility
- § 20:2 Legal Impossibility

### **II. FRUSTRATION**

- § 20:3 Generally

### **III. THE JURIDICAL BASIS OF IMPOSSIBILITY AND FRUSTRATION**

- § 20:4 Introduction
- § 20:5 Implied Term Theory
- § 20:6 The Just and Reasonable Solution

TABLE OF CONTENTS

§ 20:7 Construction Theory

**IV. THE EFFECT OF EXPRESS TERMS ON  
IMPOSSIBILITY AND FRUSTRATION**

§ 20:8 Generally

**V. SELF-INDUCED IMPOSSIBILITY AND FRUSTRATION**

§ 20:9 Generally

**VI. SALE OF GOODS**

§ 20:10 Generally

**VII. LAND**

§ 20:11 Generally

**VIII. THE EFFECTS OF IMPOSSIBILITY AND  
FRUSTRATION**

§ 20:12 At Common Law

§ 20:13 Statutory Provisions

**CHAPTER 21. ASSIGNMENT**

**I. THE NATURE OF ASSIGNMENT**

§ 21:1 Generally

**II. ASSIGNMENT BY ACT OF PARTIES**

**A. OF THE BENEFIT OF A CONTRACT**

§ 21:2 At Common Law

21:3 In Equity—Origins of Equitable Assignment

21:4 —Requirements of a Valid Equitable Assignment

21:5 —Effects of a Valid Equitable Assignment

§ 21:6 Under Statute—Origins of Statutory Assignment

§ 21:7 —Requirements of a Valid Statutory Assignment

§ 21:8 —Effects of a Valid Statutory Assignment

§ 21:9 —Effects of an Invalid Statutory Assignment

§ 21:10 What is Assignable

**B. OF THE BURDENS OR LIABILITIES UNDER A  
CONTRACT**

§ 21:11 Non-Assignability

§ 21:12 Substituted or Vicarious Performance

**III. ASSIGNMENT BY OPERATION OF LAW**

§ 21:13 Generally

## **CHAPTER 22. DAMAGES**

### **I. RECOVERY OF DAMAGES FOR BREACH OF CONTRACT**

#### **A. AT COMMON LAW**

- § 22:1 Generally
- § 22:2 Concurrent and Alternative Claims
- § 22:3 —Tort
- § 22:4 —Action for Agreed Sum
- § 22:5 —Implied Contract
- § 22:6 —Unjust Enrichment
- § 22:7 Qualifications of Right to Sue
- § 22:8 Limitation of Actions

#### **B. IN EQUITY**

- § 22:9 Generally
- § 22:10 Equitable Damages
- § 22:11 Date of Assessment

### **II. FACTORS PERTAINING TO THE RECOVERY OF DAMAGES**

#### **A. RECOVERABILITY DISTINCT FROM QUANTIFICATION**

- § 22:12 Generally

#### **B. CAUSATION IN FACT**

- § 22:13 Generally

#### **C. REMOTENESS IN LAW**

- § 22:14 Development of Rules Relating to Remoteness
- § 22:15 The Objective Test
- § 22:16 The Subjective Test

#### **D. SPECIAL PROBLEMS**

- § 22:17 The Doctrine of *Bain v. Fothergill*
- § 22:18 Leases
- § 22:19 Intangible Loss
- § 22:20 Transferred Third Party Losses

### **III. QUANTIFICATION OF DAMAGES**

#### **A. SUBSTANTIAL AND NOMINAL DAMAGES**

- § 22:21 Generally

TABLE OF CONTENTS

**B. PUNITIVE DAMAGES**

§ 22:22 Generally

**C. DISGORGEMENT DAMAGES**

§ 22:23 Generally

**D. ASSESSMENT OF SUBSTANTIAL DAMAGES**

§ 22:24 Duty to Assess

§ 22:25 Date of Assessment

§ 22:26 Alternative Measures of Damages

§ 22:27 Contributory Fault

§ 22:28 Deductions

§ 22:29 Contracts Involving Foreign Currency—Nature of the Problem

§ 22:30 —Currency of a Judgment

§ 22:31 —Date of Conversion

**E. PRE-ASSESSMENT**

§ 22:32 Introduction

§ 22:33 Liquidated Damages

§ 22:34 Penalties

§ 22:35 Relief Against Forfeiture

**IV. MITIGATION OF DAMAGES**

§ 22:36 The Duty to Mitigate

§ 22:37 Forms of Mitigation

§ 22:38 What is Reasonable?

§ 22:39 Mitigation and Anticipatory Breach

**CHAPTER 23. EQUITABLE REMEDIES**

**I. SPECIFIC PERFORMANCE**

§ 23:1 Nature and Purpose

§ 23:2 When Obtainable

§ 23:3 When Unobtainable

§ 23:4 Obligations of Plaintiff

**II. INJUNCTIONS**

§ 23:5 Nature and Scope

§ 23:6 Availability

§ 23:7 Negative Obligations

§ 23:8 Adequacy of Damages

§ 23:9 Duration—Permanent Injunctions

§ 23:10 —Interlocutory and Interim Injunctions

### III. RESCISSION

- § 23:11 Common Law Rescission
- § 23:12 Equitable Rescission—In General
- § 23:13 —Fraud
- § 23:14 —Innocent Misrepresentation
- § 23:15 —Inequitable Bargains
- § 23:16 Barriers to Rescission
- § 23:17 The Importance of *Restitutio*

### IV. RECTIFICATION

- § 23:18 Nature and Problems
- § 23:19 Requirements of Rectification—Essential Elements
- § 23:20 —Mistake
- § 23:21 —Common Intention
- § 23:22 —The Evidence
- § 23:23 Bars to Rectification

#### Table of Cases

#### Index