## TABLE OF CONTENTS

**Chapters**:

# DETAILED TABLE OF CONTENTS

# Preface

Let me start here by tendering my most profuse and sincerest apologies for the delay in updating my Contracts note after NCA twice updated the syllabus. I was terribly constrained for time due to other assignments. But I've been besieged by torrents of enquiries, requests and demands for the updated notes. Honestly, I didn't really avert my mind to these demands initially as I thought candidates would eventually find alternatives. But I became disturbed when more than five different NCA candidates informed me, individually, that they would have to postpone their Contracts exam since my updated notes were not yet available! Some told me that they had been using my study materials for all of their NCA exams and passed, as they found my materials easy to understand and very helpful. I pointed out to one of them that she could get other Contracts notes elsewhere but she told me point-blank that those other materials were not as helpful as mine, and she couldn't risk failing the exams. That was as humbling, honouring as it was disturbing. I couldn't bear the thoughts further that my delay in updating my Contracts notes was actually forcing some candidates into postponing their exams! I couldn't afford to delay any longer. So, I had to put many things aside to work on the updates in line with the current syllabus.

Again, for those who have had to endure inconveniences because my updated Contracts notes were not available on time, I tender my unreserved apologies. I deeply appreciate your patronage and will never take you for granted. The delay was due to circumstances beyond my immediate control though I was conscious of the fact that I cannot put out notes that are not in tune with the current NCA syllabus. And, I must add this: I never knew my notes had gained so much popularity with NCA candidates. The sheer number of messages! WOW!!

So, here we are!

Welcome to the August 2023 Version of my Contracts notes. It became expedient to revise and update this note because NCA updated its Contracts syllabus.

Please take note of the following new topics in the current syllabus:

1) Indigenous Peoples and Contracts

2) Offer and Acceptance
3) Interpretation.

I've ensured that all topics in the current syllabus are covered in my updated notes.

NCA's previous Contracts syllabus contained explanatory notes at the beginning of some of the topics. I found these very useful as it provided guidelines on what the candidate is expected to focus on. That was why I incorporated these guidelines into my previous notes, in a modified form, to enable the readers kill two birds with one stone – read the note and be acquainted with the syllabus. However, the structure of the new syllabus did away with those explanatory notes. Nonetheless, I have decided to retain them because, again, I believe they serve a useful purpose and will streamline your attention to focus on the most important aspects. I repeat again, that the current syllabus does not contain these explanatory notes, and anyone who chooses is entitled to skip them. These notes from previous NCA syllabus are indicated in red italicised font with a check mark (√) mark wherever they appear in these notes, whether or not stated as *"Culled from NCA previous syllabus.*

Once more, I welcome you to my revised edition of the Contracts Notes and I hope you find them as helpful as always.

All the best in your exams!

Manuel Akinshola

(Licensee of the Law Society of Ontario)

**CHAPTER 1**

# INTRODUCTION

- ✓ *An understanding of contract law gives us an opening on much of the social development within our society. Thus, historically, the emergence of a laissez-faire economy could not have been realized without development of a sophisticated means of exchanging goods, services and labour. Similarly, the importance of capital and its investment potential could not have been insured without a method of protecting forward exchange.*
- ✓ *The historian, Niall Ferguson, (Empire) has described this importance and the stabilizing effect that the common law, particularly contract law, had for the emergence of Britain's empire. In the latter stages of the 20th century the rise of the modern welfare state saw restraints placed on freedom to contract.*
- ✓ *However, today, as many question the continued sustainability of our current social structuring, contract law is once again rising in importance as a tool to allocate entitlements and as a way to create efficiency.*
- ✓ *In this first chapter you should review the current contemporary theories offered to provide explanatory accounts of contract law. (Culled from NCA's previous syllabus on Contracts)*

## 1) The Development of Contract Law

The most important question for the law of contracts is to seek to determine the issue of whether the parties have reached an agreement on a particular promise which ought to be enforced. Thus, the law of contract is essentially about the enforcement of promises.

While the structure and main features of contract under common law has become established over the years, the doctrines of contract law has continued to develop in response to changes in the socio-economic environment. In Canada, some of the most noticeable changes in contract law have been brought about by recent judicial decisions led by the Supreme Court of Canada (SCC), e.g., the decision in *Bhasin v. Hrynew (2014)* which recognises the general principle of good faith in contract performance as theoretical justification for some pre-existing rules of contract law; the decision in *Uber Technologies Inc. v. Heller* which transformed the meaning of the doctrine of unconscionability. Additional decisions of the SCC and other provincial courts have led to the development or reformulation of contract law doctrines like law of rectification, privity of contracts, specific performance, mitigation, proprietary estoppel, and contractual interpretation.

Other sources which have equally influenced the development of contract law in Canada are judicial decisions from other common law jurisdictions which have continued to provide inspiration and references for Canadian judges in interpreting and redefining the general principles of contract.

## 2) General Principles of Contract Law

As we have noted above, the law of contract is founded upon some basic principles developed by the common law. This is to say that the general principles of contract developed from judicial decisions of the English courts guided by the doctrines of *stare decisis* or precedent, which direct court to follow prior judicial decisions of higher courts. Thus, common law developed the remedies of damages for an injured party in a contract. The basic underlying principle of common law in the development of contract law is the principle of *pacta sunt servanda*, i.e., agreement must be kept, based on applicable statutes and or reports from previous judicial decisions.

However, while we remember the role of common law in the development of the general principles of contract law, we must not forget the role played by equity also. Remember that equity originated from the desire to ameliorate the harsh effect of the implementation of the common law and appealed more to the conscience than the law. Thus, equity developed doctrines of personal remedies like specific performance and injunctions which were not available under common law but which were designed to give more practical reliefs to an injured party. Therefore, where one of the parties to a contract is injured by the breach of the other and the agreement between them is of such nature that could be enforceable, equity may step in to order specific performance of that contract rather than mere award of monetary damages which may not entirely suffice.

In the same light, equity developed other principles of contract law which were considered more practical than those available under common law. For example, under equity, a victim of inducement or undue influence in an agreement between two parties may be entitled to the equitable relief of rescission that would set aside the agreement. Common law does not grant such reliefs.

As we all know, since the fusion of common law and equity in 1873, the doctrines of both common law and equity became applicable in all English courts, and this was passed over to all English dominions. In Canada, therefore, both the doctrines of common law and equity operate to guide parties and provide them with remedies where there is a breach. The relevant maxim here, though, is that in the event of any conflict between equity and common law, equity prevails.

Contract law continues to undergo development and transformation. Today, judges now rely not only on previous decisions in common law jurisdictions to reach a decision, they equally make references to a wide array of sources which aid them in the decision making process. These include academic writings by renowned jurist, workshops and commission reports aimed at developing the law, opinions of friends of the courts, etc. Thus the general principles of contract law even though have their roots in medieval history continues to be modernized and developed today.

**(CHAPTER 1 CONTINUES ON AND ON)**

**CHAPTER 2**

# INDIGENOUS PEOPLES AND CONTRACTS

This is one of the topics recently added in the latest NCA syllabus updates and it considers the law regulating Indigenous people in relation to commercial transactions. Remember that Indigenous people had always existed before contact with Europeans and they had several contractual relationships among themselves, guided by their indigenous laws. After the Europeans came, the Indians Act was promulgated that substantially regulated how Indigenous people live, including in relation to contractual matters. So, this chapter seeks to examine if the Indigenous laws have remained frozen in the past or if they have been adapted to Canadian laws and vice versa. We will first look at the statutory requirements of when a contract with an Indigenous people will be regarded as valid and enforceable. Please note that emphasis here is on the post-contact period.

As you would remember, three Aboriginal groups are identified by section 35 of The Constitution Act, 1982 which specifically recognizes and affirms the existing aboriginal and treaty rights of the First Nation, Inuit and Metis peoples of Canada. However, this chapter will be limited to the First Nations people in considering their authority to enter into contracts.

## a. Sources of Authority – the Band Council Resolution

There are many sources of authority of the First Nations people to enter into contracts, such as the constitutions, bye laws, land codes, or modern treaties but the courts have placed more emphasis on section 2(3)(b) of the Indian Act, 1876 which confers power on the council of a band which power is to be exercised by a majority of the councillors of the band present at a meeting of the council duly convened. (Quickly, an Indian Band is a governing unit of Indians as instituted by the Indian Act which defines a band as a body of Indians for whose use those titles and the lands vested in Her Majesty have been set apart. The Band Councils or Councils of the Band are responsible for the governance and administration of band affairs which include education, band schools, housing, water, roads, etc. The Council functions to provide administration of all federal funding provided under the Indian Act to First Nations).

Section 2(3) of the Indian Act provides thus:

> **Exercise of powers conferred on band or council**
>
> (3) Unless the context otherwise requires or this Act otherwise provides,
>
> (a) a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band; and
>
> (b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.

The decision of the band is known as a Band Council Resolution (BCR), which when reduced into writing is an evidence of the oral decision and is similar to a drafted contract. It has been held that the council's powers under this section are to be exercised strictly in accordance with the Indian Act in the interests of the benefits and protection of Indians. So, a band is only contractually bound when all the statutory requirements of this section are met, i.e., *consent of a majority of the councillors of the band present at a meeting of the council duly convened.*

**(CHAPTER 1 CONTINUES ON AND ON)**

**CHAPTER 3**

# OFFER AND ACCEPTANCE

- ✓ *Much of contract doctrine is built upon a paradigmatic model of a contract; one that is negotiated between two parties of equal bargaining power, and which results in an individual contract with readily identified binding obligations. While this model may describe some contracts, contracting behaviour is far more widespread and does not typically follow this model.*
- ✓ *Consider the purchase of a coffee from a vending machine or the parking of a car in a public garage. There is no opportunity for bargaining; indeed, the contract is made with a machine. Nevertheless, it is the paradigmatic model, what is known as a synallagmatic contract, which informs our understanding of contract law, and from which other contracts are seen as deviation. The model is built on a number of constituent elements; offer, acceptance, and communication, intention to create legal relationships, consideration, privity, certainty of terms and capacity.*
- ✓ *In the first part of the course we will explore these elements. Particular attention should be paid to the treatment of the tendering process.* *(See page 40 below).* *(Culled from NCA's previous syllabus on Contracts)*

## 1) THE KINDS OF PROMISES LEGALLY ENFORCED

The law of contract describes the formation of a contract in terms of rules that define the process of contract formation. Thus, for a contract to be regarded as binding, the parties must come to the same determination, which must be disclosed by written or spoken words, or by any other means which will signify an intention from which an implication of law, or an inference of fact, or even both, may be made.

A contract does not exist until there has been a definite offer and an unqualified and unconditional acceptance which must be communicated to the Offeror. This notwithstanding, there is a general rule that a court should interpret a contract, if possible, so as to make it work.

Contractual relationships are usually divided into bargains and non-bargain promises.

A bargain is an exchange agreed on; thus, the existence of a bargain has been the chief criterion for the enforceability of promises in the common law.

The constituent parts of a bargain are:

- Intention
- Offer and acceptance – i.e., mutual assent to sufficiently certain terms
- Consideration – which is an exchange of value

Notwithstanding the view in the 19th century that all contracts were bargains, it became obvious that it may not be a full account of contract law and that there may be other reasons for the enforcement of promises. These are known as non-bargain promises.

## 2) Elements of a Valid Contract

### a. Offers and Preliminary Negotiations

An offer is an expression by one party of his assent to certain definitive terms, provided the other party involved in the bargaining transaction will likewise express his assent to the identically same terms. In other words, an offer is the communication by one person (the Offeror) to another person (the Offeree) indicating that the Offeror is willing to enter into an agreement with the Offeree on certain specified terms. An offer therefore looks forward to an agreement – to the mutual express of assent. This is what distinguishes it from mere invitation to commence bargaining or invitations to treat.

The making of an offer legally creates the power of acceptance in the Offeree. This is because after an offer is made, a voluntary expression of assent by the Offeree is all that is necessary to create what we call contract.

For the act to be recognized as an offer and create a power of acceptance, it must be an expression of will or intention, an act that reasonably leads the Offeree to believe that the power to create a contract has been conferred upon him. This will be distinguished from invitations to deal, mere preliminary negotiation, and acts evidently made in jest. And it must be such as to justify the Offeree in thinking that it is directed to him for his acceptance.

For an offer to be legally operative and create power of acceptance, it must contain all the terms of the contract to be made. It is not enough for one party to make a promise on what he will do, he must specify what he will do it for.

**(CHAPTER 1 CONTINUES ON AND ON)**