

LAW122: Business Law - Contracts

McInnes, Kerr, & Vanduzer. (2018). *Contracts*. In *Managing the Law* (5th ed., pp. 163-199). Canada: Pearson.

When is a contract formed?

1. Intention to create legal relations
2. Meeting of the minds – Offer/Acceptance
3. Consideration

Intention to Create Legal Relations

- If a reasonable person would believe the parties intend to create a legally enforceable contract
- In commercial context, the presumption is that there is intention
- In family/social context, the presumption is that there is NO intention

Offer

- Indication of willingness to enter into a contract on certain terms
- Invitation to treat is not an offer; indication of willingness to receive offers
 - o Based on reasonable person test – would a reasonable person think the event was an offer...
 - o For example, newspaper advertisements/Tim Hortons advertisements are more likely to be viewed as invitations to treat
- Offer must be communicated and received as an offer (also determined by reasonable person test)
- Offer might cease to exist through (at which point, offeree can no longer accept it):
 - o Revocation – withdrawal of the offer (must be reasonably communicated)
 - o Lapse of time – lapse when deadline or reasonable length of time passes
 - o Death/Insanity – offeror/offeree die
 - o Rejection – refusal of an offer
 - o Counter Offer – when offeree tries to change the terms of the original contract

Acceptance

1. Acceptance by promise
 - Can happen through:
 - o Words – either in writing or orally
 - o Conduct – nod/ shake hand, as long as a reasonable person would interpret it as acceptance
 - o Silence - (Ex. Subscription services like Netflix...)
 - Acceptance at a distance
 - o General rule – if acceptance is communicated by instantaneous communication, it is effective when it is received by the offeror
 - o Postal rule - if acceptance is communicated by non-instantaneous communication like the courier/mail, it is effective when/where it is sent
2. Acceptance by performance
 - Occurs when act is exchanged for a promise
 - Ex. Lost and find “reward”...
 - o Offer to pay \$500 to anyone who finds a dog and returns it. Upon performance, there is obligation to fulfil the contract

Consideration

- Exists when a party either gives (or promises to give) a benefit to someone else or suffers (or promises to suffer) a detriment

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- **In order for a contract to be formed, consideration has to be mutual and sufficient...**
 - o Must be provided by both parties - mutual
 - o Must be anything of value, not necessarily adequate (does not protect from bad bargains) – sufficient
- Gratuitous promise is not usually enforceable...
 - o If someone says “ I will give you my old phone”, it is not an enforceable contract, as there is no mutual consideration... What is the other person giving up?
- Forbearance to sue – promise not to pursue a lawsuit
 - o It depends... ex. Invalid if one party improperly compelled the other party to enter; also, invalid if the party that threatened to sue did not honestly believe that the claim was valid in the first place
- Pre-existing obligations and consideration
 - o Pre-existing public duty – no consideration
 - Ex. Firefighters or police officers cannot sell their services (already have an explicit public duty)
 - o Pre-existing obligation to third party – yes (consideration)
 - Ex. Using the same consideration to satisfy both contracts (with different parties)
 - o Pre-existing obligation owed to the same party – no consideration
 - If promise/consideration is merely repeated, it does not provide anything of value....
 - So, if someone asks for additional payment without providing any consideration (to the existing contract) = no consideration\
- However, there are promises enforceable without consideration
 - o Seal – mark put on the document to specify the party’s intention to be bound by the terms even though the other party may not be given consideration
 - o Promissory estoppel – doctrine that prevents a party from retracting a promise that the other party has relied upon
 - Exception to the general rule that prevents enforcement of gratuitous promises
 - Narrow application; must meet 4 criteria:
 - *Representation* – representation that rights will not be enforced
 - *Reliance* – reasonable reliance upon the representation
 - *Inequitable behaviour* – absence of inequitable behaviour by the representee
 - *Existing legal relationship* – not creation of new rights, variation of an existing relationship

Privity

- Refers to the relationship that exists between the individuals who create the contract
 - o Only *parties* to an agreement
 - o If someone receives a benefit but are not party to the contract, they are *third-party beneficiary*
- In order for a ‘stranger’ to a contract to enforce a contractual promise, the rights must be explicitly assigned via “assignment clause”