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Although great care has been taken to prepare these notes there may be errors and omissions. These notes are no substitute for attending lectures and scrutinizing the suggested and required readings. Enjoy.

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Introduction to Legislation

Historical Development

The present commercial law goes back to English sources of the late 19th century as part of the movement for the codification of commercial law that happened in England at that time. Various common law and provisions were consolidated into the original *Bills of Exchange Act*. The success of this *Act* resulted in the commissioning of the creation of a *Sale of Goods Act*. Interestingly, the *Sale of Goods Act* as it exists today resembles quite closely the late 19th century version. The purpose of the *Act* was to transport the practices around the entire English empire and codify the entire body of common law for better understanding and predictability. There were attempts to transport the *Act* throughout all of the British controlled dominions, which has had a lasting effect throughout the common-law world.

This movement towards uniformity and harmonization had a very extensive effect. The legislation has had a very significant effect for quite a long time. There have been movements for reform of the legislation. The most significant source of reform ideas has been the effort that has been made in the United States to take commercial law and adapt it to the needs of the American economy.

The first efforts of reform in the United States were very significantly influenced by the *Chalmers* legislation. Instead of providing separate legislation, the American government realized that it would be more efficient to adapt the existing British legislation. However, by the time major reforms were being discussed in the 1930s there was a new approach, which reflected the demand of merchants along the Eastern seaboard.

The *Uniform Commercial Code* was developed in the United States as part of the reform effort and this new legislation reflected the needs of those merchants and also of legal thinking at the time. Welland drafted a sales system through Article 2 that appears to operate without heed to the notion of ownership or title to the goods.

Ontario's Common Law Approach and Contracting Out

Within Ontario we still have the Chalmers *Sale of Goods Act*, 1893. There have been some suggestions for reform, but there has been no significant change in the legislation. The legislation itself adopts a standard common law approach for codification. The *Act* does not purport to replace all of the other Sales law in existence.

Section 57 of the *Sale of Goods Act* provides:

> **57. (1)** The rules of the common law, including the law merchant, except in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause, continue to apply to contracts for the sale of goods.

Sale of Goods Act, Section 53 indicates that the parties can change the application of the Act through express agreement. In other words, section 53 allows for the express contracting out of the Act:

> **53.** Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

Convention on International Sale of Goods

The *Convention on International Sale of Goods* is a result of global attempts to harmonize sales law – In particular to harmonize sales law as between common law and civil law countries. The essence of the movement is to establish a background framework for an international sale. For the *Convention* to apply we must be dealing with at least two business parties on either side of the transaction – not consumer sales, but rather commercial sales.

UNCITRAL was given the task of attempting a harmonization. The result was the *Vienna Sales Convention*, which was adopted in 1980 and entered into force as an international treaty in 1988. The *Convention* considered both the questions of contract formation and substance. A number of countries are party to the convention, including most of Western Europe, Russia, Australia, China, Canada, and the United States. The major nations not party to the *Convention* are the United Kingdom and Japan.

The *Convention* has a federal escape clause for countries like Canada with bodies of sales law within its federal jurisdiction. All Canadian jurisdictions are party to the Convention as of 1993. The Convention itself is a schedule of the *Ontario International Sale of Goods Act*. Article 100(2) provides that the Convention applies only to contracts formed on or after the date in which the Convention came into force in the relevant jurisdiction.

Ontario's Start Date for the Convention

For Ontario, contracts entered into from and after June 1, 1992 are potentially under the *Vienna Sales Convention* rather than any other legislation. If the legislation applies it will be the background legislation. Article 6 of the Convention provides that parties may opt-out of, exclude, or derogate from the framework.

Application of the Convention

There are two ways in which the Convention may be applied as the framework for a sale:

1. Two countries contracting who are part of the convention; or,
2. Where one party is privy to the convention and the parties to the contract opt for the application of the convention as part of a choice of law clause. Consider also the expansive nature of the convention itself embodied in Article 1.

The parties must be business entities on both sides. The *Convention* is not retroactive, but instead applies only from the point onwards from when the country became privy to the convention. There are two main routes for having the convention apply:

1. **Article 1(1)(a)** – If the two states involved are contracting states to the convention then the background framework is the convention; *or*,

2. **Article 1(1)(b)** – when the rules of private international law lead to the application of the law of a contracting state the background framework may be the convention. The rules of private international law will set out which system to adopt in order to settle disputes. The *CSIG* has an in-built mechanism for its own expanse.

Most of the time we will wind up with the *Convention* as the framework because both of the states involved are contracting parties. The two main exceptions to the *Convention on the International Sale of Goods* are the UK and Japan.

The Convention and Reservations

International treaties often allow a country to become a party of the treaty but reserve on a number of provisions to which they do not want to be bound. The *Convention* contains very few options for reservation. Article 95 of the *Convention* will permit a reservation on Article 1(1)(b), however. It is possible to enter a reservation on the expansion of the *Convention's* coverage. For instance, the United States has entered a reservation pursuant to Article 95 and, therefore, does not participate in the expansion of the treaty by means of private international law rules. This means that if a contract exists between two commercial players in the United States and some other non-member of the convention, there is no application of the *Convention* even if the rules of private international law lead to it in the transaction – In this way Article 1(1)(b) is not part of the United State's treaty.

Generally speaking, if you are dealing between parties to the *Convention* it is quite unproblematic as Article 1(1)(a) provides the *Convention* as the background framework. Because of the possibility of a reservation to Article 1(1)(b) questions as to the applicability of the convention by way of the rules of private international law might create some difficult issues. From our perspective in Canada, Article 1(1)(b) is part of the *Convention*.

Opting/Contracting Out of the Convention

We know that you can opt-out of the convention – the Convention says so. The question is what you actually have to do in order to contract out. The problem is that a simple declaration of opting for the law of some other jurisdiction might result in an application of the convention anyway as it is not a sufficient contracting out. For instance, consider the *International Sale of Goods Act* of Ontario Section 6:

> Parties to a contract to which the convention would otherwise apply may exclude its application by expressly providing that the local domestic law of Ontario or some other jurisdiction applies or that the Convention does not apply.

What happens if you do not follow exactly the words, "We choose the local domestic law of jurisdiction X"? It is not entirely clear whether or not this counts as an opt-in for a particular jurisdiction as much as it lends to the application of the Convention. For the United States, there is a slightly different argument about what happens when choosing the law of a particular jurisdiction. Suppose an old precedent is used where the document proposes, "I choose the law of jurisdiction X". The complication in the United States is that the treaty making and implementing power is federal rather than at the state level. In the United States the implementing process for the *CISG* was at the federal level through the Senate. Thus, in the United States it is possible to argue that the *CISG* is federal law and if you are choosing a State law you are not choosing a federal law. This notion is under continual debate in the United States. There are two arguments about how to interpret a choice in favour of the State law. There is more of an argument in favour of saying the clause would get you the local state Uniform Commercial Code.

Contractual Problems in Consumer Transactions

Introduction

The courts and legislatures have been challenged to fashion appropriate responses to two distinct types of problems:

1. Where the seller of goods or services takes advantage of the gullibility, weakness, or ignorance of a consumer to strike a manifestly unfair bargain, or s/he uses high-pressure sales techniques or other unethical selling practices to overcome the consumer's resistance; and,
2. Where there is no identifiably unfair pressure upon the consumer to contract, but nevertheless the contract can be objectionable because of its one sided character and the overwhelmingly greater strength of the offering party

The legislative response to the problem has been embodied in the *Consumer Protection Act* and the *Business Practices Act*.

Consumer Protection Act

In General

This Act represents one phase of consumer reform across Canada – the *informational* phase. You want to ensure that consumers have all sorts of information on whether or not to buy. The typical sale contemplated are for those goods that are sufficiently complicated where you would not be able to spot a problem by just looking at it. Instead, the *CPA* deals with items of sufficient complexity requiring some sort of disclosure for better consumer empowerment.

No Contracting Out – Section 33

The consumer must be told about the good, the warranty, any information relating to financing in standardized forms, etc., The idea is that when you have all the appropriate information the consumer will make a most rational decision before entering into a contract.

Section 33 of the *Consumer Protection Act* provides that the *Act* applies despite any agreement or waiver to the contrary:

> **33.** This Act applies despite any agreement or waiver to the contrary

The provisions concerning executory contracts were part of the original provisions. An executory contract is one where the provision of goods or services does not have the exchange of payment in full at the same time. In this respect, something may be purchased over time – there is some ongoing element, such as delivery, provision of service, or payment over time.

Part II – Executory Contracts

Any executory contract exceeding a value of $50 will trigger Part II of the *Act*. Section 18 provides:

> **18.** This Part applies to executory contracts for the sale of goods or services where the purchase price, excluding the cost of borrowing, exceeds a prescribed amount, but does not apply to executory contracts to which Part II.1 applies.

1. Information Requirements

All executory contracts must include in its written documentation the informational requirements listed under the *Act*. Failure by the vendor to provide the purchaser with the information required shall result in a non-binding contract on the buyer. Section 19 provides:

> **19.** Every executory contract, other than an executory contract under an agreement for variable credit, shall be in writing and shall contain,
> (a) the name and address of the seller and the buyer;
> (b) a description of the goods or services sufficient to identify them with certainty;
> (c) the itemized price of the goods or services and a detailed statement of the terms of payment;
> (d) where credit is extended, a statement of any security for payment under the contract, including the particulars of any negotiable instrument, conditional sale agreement, chattel mortgage or any other security;
> (e) where credit is extended, the statement required to be furnished by section 24;
> (f) any warranty or guarantee applying to the goods or services and, where there is no warranty or guarantee, a statement to this effect; and
> (g) any other matter required by the regulations.

Schofield v. Rose (1975) ON Co. Ct.

Facts	Holding
○ Information was missing from an executory contract ○ The defendant had begun performance of an executory contract	○ Once the seller has begun performance the contract can no longer be properly characterized as executory, but rather partly executed ○ The informational requirements of the *CPA* apply only to executory contracts – once performance begins, the requirements do not apply

2. Place of Business Considerations and Cooling Off

If an executory contract is negotiated at a place other than the seller's permanent place of business, then the buyer can simply cancel within 10 days of getting a duplicate copy of the agreement (an automatic cooling off period). Section 21 provides:

> **21.(1)** Where a seller solicits, negotiates or arranges for the signing by a buyer of an executory contract at a place other than the seller's permanent place of business, the buyer may cancel the contract by delivering a notice of cancellation in writing to the seller within 10 days after the duplicate original copy of the contract first comes into the possession of the buyer, and the buyer is not liable for any damages in respect of such cancellation.

Upon exercising his/her right of cancellation, the buyer is obligated to return and bear the expense of the returning any of the items received as part of the contract. The seller is then obligated to return any money s/he has received.

Part II.1 – Direct Sales Contracts

Definition – Section 23.1

As of 2001, the *CPA* included a number of provisions dealing with all direct sales contracts. A direct sales contract means a contract between a buyer and seller for goods or services where the price exceeds

$50 and is negotiated at a place other than the seller's place of business. Section 23.1 provides the definition of 'direct sales contract':

> **23.1** In this Part, "direct sales contract" means a contract between a buyer and a seller for goods or services where,
> (a) the purchase price exceeds a prescribed amount, and
> (b) the contract is negotiated or concluded in person at a place other than the seller's place of business or a market place, auction, trade fair, agricultural fair or exhibition

Information Requirements – Section 23.2

The seller in a direct sales contract is required to meet the informational requirements of the *Act* and deliver a copy of the contract with that information to the purchaser. Section 23.2 provides:

> **23.2(1)** A direct sales contract must contain the information required by the regulations
>
> **(2)** A seller who enters into a direct sales contract with a buyer shall deliver to the buyer a written copy of the contract that contains the information required by the regulations.

Cancellation Rights and Cooling Off – Section 23.3

A purchaser is given the protection of a 10-day cooling off period whenever s/he enters into a contract properly described as a direct sales contract. During this 10-day cooling off period, s/he may cancel the contract. Also, a purchaser who has not received a written contract from the seller containing the information required by the regulations may cancel the contract within one year. Section 23.3 provides:

> **23.3(1)** A buyer under a direct sales contract may, without any reason, cancel the contract at any time from the date of entering into the contract until 10 days after receiving the written copy of the contract mentioned in section 23.2.
>
> **(2)** In addition to the right under subsection (1), a buyer under a direct sales contract may cancel the contract within one year of the date of entering into the contract if it does not contain all the information required by section 23.2

The Notice Requirement – Section 23.4

The cancellation of a direct sales contract requires notice in writing in accordance with the provisions of the *Act*. Section 23.4 provides:

> **23.4(1)** To cancel a direct sales contract, a buyer shall give a notice of cancellation in accordance with this section
>
> **(2)** The cancellation takes effect when the buyer gives the notice of cancellation.
>
> **(3)** The notice of cancellation may be expressed in any way, as long as it indicates the intention of the buyer to cancel the direct sales contract.
>
> **(4)** The notice of cancellation may be given by any means, including personal service, registered mail, courier or telecopier or any other method by which the buyer can provide evidence of the date of cancelling the direct sales contract.

> **(5)** Where the notice is given other than by personal service the notice of cancellation shall be deemed to have been given when sent.
>
> **(6)** The buyer may send or deliver the notice of cancellation to the seller at the address set out in the direct sales contract or, if the buyer did not receive a copy of the contract or the address of the seller was not set out in the contract, the buyer may send or deliver the notice:
> (a) to any address of the seller on record with the Government of Ontario or the Government of Canada;
> (b) to an address of the seller known by the buyer; or
> (c) to a salesperson of the seller at an address known by the buyer.

Business Practices Act

Like the *Consumer Protection Act*, there is no contracting out of the *Business Practices Act*. This Act is concerned with looking very precisely to the bargain and *unfair* or *unconscionable practice*. The Act looks specifically at the balance of power between the negotiating parties and if there is a serious imbalance the consumer may be able to escape the contract in reliance of the statute. The *Act* looks also to the representations made by the parties.

Unfair Practices and Unconscionability

"Unfair Practices" are defined and enumerated under subsection 2(1) of the *Act* while "Unconscionable" consumer representations are defined and enumerated under subsection 2(2) of the *Act*.

These allow for a much more significant and substantial review of a transaction and allows for evidence to be presented concerning *all* of the elements and representations made pre-contract, during negotiations, etc., However, the usual problem is embodied in subsection 4(5) – a six-month limitation:

> "A remedy conferred by subsection (1) may be claimed by the giving of notice of the claim by the consumer in writing to each other party to the agreement within six months after the agreement is entered into."

If the transaction is not balanced, then the consumer can get out of the transaction. If it goes to the extent that there is an unconscionable act, then the consumer can ask for punitive damages.

Rescission Based on Unfair Practice

The buyer must be a consumer (natural person not including a business) and the Act refers to both goods and services. There is an exhaustive list of things that are deemed to be unfair practices and a number of representations that will be considered unconscionable. Under section 4, if a contract is entered into after an unfair practice, the contract may be rescinded by the consumer and entitled to all available remedies. Subsection 4 provides:

> **4.(1)** Subject to subsection (2), any agreement, whether written, oral or implied, entered into by a consumer after a consumer representation that is an unfair practice and that induced the consumer to enter into the agreement,
> (a) may be rescinded by the consumer and the consumer is entitled to any remedy therefor that is at law available, including damages; or
> (b) where rescission is not possible because restitution is no longer possible, or because rescission would deprive a third party of a right in the subject-matter of the agreement that the third party has acquired in good faith and for value, the consumer is entitled to recover the amount by which the

amount paid under the agreement exceeds the fair value of the goods or services received under the agreement or damages, or both.

(2) Where the unfair practice referred to in subsection (1) comes within paragraph 2 of section 2, the court may award exemplary or punitive damages.

(3) Each person who makes the consumer representation referred to in subsection (1) is liable jointly and severally with the person who entered into the agreement with the consumer for any amount that the consumer is entitled to under subsections (1) and (2).

(4) Despite subsection 31 (2) of the *Consumer Protection Act*, the liability of an assignee of an agreement under subsection (1) or of any right to payment thereunder is limited to the amount paid to the assignee under the agreement.

(5) A remedy conferred by subsection (1) may be claimed by the giving of notice of the claim by the consumer in writing to each other party to the agreement within six months after the agreement is entered into.

(6) A notice under subsection (5) may be delivered personally or sent by registered mail addressed to the person to whom delivery is required to be made, and delivery by registered mail shall be deemed to have been made at the time of mailing.

(7) In the trial of an issue under subsection (1), oral evidence respecting an unfair practice is admissible despite the fact that there is a written agreement and despite the fact that the evidence pertains to a representation of a term, condition or undertaking that is or is not provided for in the agreement.

(8) This section applies despite any agreement or waiver to the contrary.

Internet Sales Harmonization Template

Approved by the Ministers in 2001, the *ISHT* provides explicit protection for the electronic consumer, such as required information disclosure and cancellation rights. The key aspects of the template include:

1. A requirement for suppliers to provide information (name, contact information, description of the goods, list of prices);
2. A written copy of the contract to the consumer within 15 days;
3. Provisions providing that failure to provide a written contract or failure to provide the consumer an opportunity to decline the contract will result in a right to cancel;
4. A right to cancel where the goods are not delivered within 30 days

Uniform Computer Information Transactions Act (UCITA) – a contract may be formed in any manner sufficient to show agreement, including offer and acceptance or conduct of both parties or operations of electronic agents, which recognize the existence of a contract.

Prepaid Service Act

This *Act* applies to services or proposed services for which payment is required in advance. The contract for services must be in writing and is limited in duration for a maximum of one year. A customer may rescind a contract by delivering written notice of cancellation within five days of the signing of the contract or the availability of the services.

Formation of the Contract

Notice of Terms

ProCD Inc. v. Matthew Zeidenberg and Silken Mountain Web Services (1996) CCA

Facts	Holding	Ratio
○ ProCD produces an electronic database of telephone directories ○ Every box of the software declared that it comes with restrictions in an enclosed license ○ The defendant, bought a consumer package and ignored the license ○ ProCD filed suit seeking an injunction against rights that exceed the license rights	○ Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general ○ A vendor may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance while a buyer may accept by performing the acts the vendor proposes to treat as acceptance ○ ProCD extended an opportunity to reject if the buyer found the terms unsatisfactory; Zeidenberg inspected the package, tried out the software, learned of the license, and did not reject the goods	○ So long as notice of terms and conditions of a contract are given to another party before the acceptance of the contract, which may be by way of positive conduct, the contract will be binding ○ Acceptance of an offer differs from acceptance of goods after delivery

Trans Canada Credit Corp. Ltd. v. Zaluski (1969) ON Co. Ct.

Facts	Holding	Ratio
○ Defendants were not interested in purchasing a vacuum cleaner ○ Third party offered defendant $25 for every vacuum cleaner sold on their referrals ○ Third party produced a conditional sales agreement and promissory note ○ The documents were signed based on the explanation given, but not read by the defendant ○ Third party assigned contract and note to the plaintiff – defendants refuse to pay ○ Defendant cross-claimed to include third party ○ Third party argues the contracts written terms should be enforced	○ The plaintiff is the holder of the credit not having known of any fraud – the plaintiff is entitled to $252.72 and costs and counsel fee of $25 ○ Extrinsic evidence will always be admitted to defeat a deed or written contract on the grounds of fraud or misrepresentation – the third party was guilty of fraudulent misrepresentation ○ The third party misrepresented the transaction to the defendants ○ Fraud is proved when it is shown that a false representation has been made, (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false	○ Extrinsic evidence will be admitted as an exception to the general rules of the Statute of Frauds to defeat a deed or written contract on the grounds of some *fraud* or *fraudulent misrepresentation* ○ Fraud is proved when it is shown that a false representation has been made: 1. Knowingly; 2. Without belief in its truth; 3. Recklessly, careless whether it be true or false

Representations and Warranties

Esso Petroleum Co. Ltd. v. Mardon (1976) Eng CA

Facts	Holding	Ratio
○ A representation was made that a service station's throughput was 200,000 gallons, but it was	○ Esso had the background knowledge and requisite skill to make a factual representation – because of their skill that representation should not be	○ If a person skilled in the trade makes a forecast intending that the other should act upon it, and the other does act upon it, it can well be interpreted as a warranty

in fact 60,000 to 70,000 per year ○ Mardon lost his money and Esso claimed for possession – Mardon counterclaimed based on breach of warranty and negligent misrepresentation for damages	characterized as mere opinion ○ *Hedley Byrne & Co. v. Heller and Partners*: A professional is under a duty to use reasonable care to see that the representations made to another, be it for the purpose of advice, information, or opinion, is correct. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion and thereby induces the other side to enter into a contract with him, he is liable in damages.	that the forecast is sound and reliable in the sense that it was made with reasonable care and skill ○ If a representation is made in the course of dealing for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering the contract, that is *prima facie* ground for inferring that the representation was intended as a warranty

A warranty must be made with promissory intent. Otherwise the statement is a mere representation and the representee will not be able to sue in contract for damages. If a representation ahs the purpose and effect of inducing the other party to enter into a contract, which is a *prima facie* ground for inferring that a promise was intended. To qualify as actionable, the statement must be a material statement. The test for materiality is whether the statements would induct a reasonable person to enter into the contract. A representation is material if a reasonable person would not have entered into the contract but for the representation.

An action may lie in tort for negligent misrepresentation as per *Heldey Byrne* in respect of wrong information or advice given by one contracting party to another. However, there must be some duty of care arising out of a special relationship between the parties. In determining whether a special relationship exists, the courts have focused on such factors as:

1. The skill of the advisor;
2. The skill of the advisee;
3. The nature of the occasion;
4. Whether the advice was solicited; and,
5. The nature of the advice (was it a statement of fact, opinion, or merely speculative)

Damages – In contract law you can bring a claim for the expectation interest – what you would have gotten if the contract had been performed as anticipated. This is often embodied in the idea of loss of profits. Tort damages, on the other hand, are for reliance or a restitution of things actually paid out.

Murray v. Sperry Rand Corp (1979) ON HC

Facts	Holding	Ratio
○ A buyer bought a harvester from a dealer on the strength of a brochure advertisement ○ The harvester does not live up to the representation in the brochure: produce the output that it says it ought to, the silages are not of the quality that ought to be produced ○ The manufacturers representatives cannot get the harvester to the performance levels set out in the brochure advertisements ○ As between the buyer and immediate seller, it is clear that there is going to be liability here	○ Issue: How do we find liability against the manufacturer or distributor who is not privy to the immediate contract? ○ The manufacturer is the source of the brochure and may liable because of the representations in the brochure as a collateral warranty ○ The consideration in this case may be found because the manufacturer, in exchange for the dealer's effort in obtaining a contract with a purchaser, ultimately receives a benefit for the sale of its product	○ A manufacturer's representations may amount to collateral warranties even though the manufacturer is not privy to a contract ○ A person may be liable for breach of warranty notwithstanding that he has no contractual relationship with the person to whom the warranty is given

Bunge Corporation v. Tradax Export (1981) HL

Facts	Holding	Ratio
○ A commercial sale of soy bean required 15 days notice before shipment ○ Seller did not get 15 days and rejected notice – wanted to cancel the contract ○ The buyer argued that the term of the contract is not a condition, but is a warranty	○ Issue: Is this a condition or a warranty – perhaps an intermediate or **innominate** term? ○ If you have an innominate term you look at the effect of a breach and determine whether it would be enough to end the contract ○ There is only one kind of breach to a time clause – lateness; the questions to be asked are: (1) what importance have the parties ascribed to the consequence, and (2) in the absence of expressed agreement, what consequences ought to be attached to it having regard to the contract as a whole	○ An innominate term is one that requires you to wait and see what the effects of a breach are before you decide whether or not to classify it as a warranty or condition

Considerations Under the Convention

The *Convention* will be applied from the point of view of the seller. In other words, in consideration of what the seller knew or ought to have known.

Article 2 - Application

> This Convention does not apply to sales:
> (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the
> contract, neither knew nor ought to have known that the goods were bought for any such use;
> (b) by auction;
> (c) on execution or otherwise by authority of law;
> (d) of stocks, shares, investment securities, negotiable instruments or money;
> (e) of ships, vessels, hovercraft or aircraft;
> (f) of electricity.

Consider a case where a foreign seller actually has a place of business in the domestic country. Article 10 deals with the issue of place of business:

Article 10 – Place of Business

> For the purposes of this Convention:
> (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract
> and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the
> conclusion of the contract;
> (b) if a party does not have a place of business, reference is to be made to his habitual residence.

There are no writing requirements so long as evidence can be led to show that a contract did, in fact, exist.

Article 11 – No Writing Requirement

> A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Note that the *Convention* is not particularly concerned with the validity of the contract itself, but rather issues of contract formation. Also, the *Convention* is simply concerned with the sales framework.

Article 4 – Not Concerned with Validity

> This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
> (a) the validity of the contract or of any of its provisions or of any usage;
> (b) the effect which the contract may have on the property in the goods sold.

Article 5 – No Liability for Injury

> This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

Article 8 – Intent of Communication

> (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was

Article 9 – Parties Bound by Prior Usage

> (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
>
> (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 49(1)(a) – Avoided Contract by Buyer

> (1) The buyer may declare the contract avoided:
> (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract

Article 64(1)(a) – Avoided Contract by Seller

> (1) The seller may declare the contract avoided:
> (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract

Article 25 – Fundamental Breach Defined

> A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result

Obligations under the Sale of Goods Act

Generally

The *Sale of Goods Act* has a number of provisions that imply a number of conditions and warranties to the contracts that are affected by the statute. As such, it is important to understand the difference between a contractual condition and a warranty. Where a condition is broken then the entire contract may be rescinded, where a warranty is breached then the party is entitled to damages.

The seller in any transaction governed by the *Sale of Goods Act* has the following implied obligations:

1. Section 13 – Title;
2. Section 14 – Description;
3. Section 15(2) – Merchantability; and,
4. Section 15(1) – Fitness for Purpose

Ability to Reject or Vary the Act's Provisions

The obligations under the *Sale of Goods Act* can be varied. For instance, section 53 of the *Act* provides:

> **53.** Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract

Thus, the implied conditions and warranties of the *Act* may be varied by the use of express language.

No Variance or Rejection in Consumer Transactions

However, subsection 34(2) of the *Consumer Protection Act* provides that all consumer transactions are affected by the implied conditions and warranties of the *Sale of Goods Act*. The implied conditions cannot be contracted out of:

> **34.(2)** The implied conditions and warranties applying to the sale of goods by virtue of the *Sale of Goods Act* apply to goods sold by a consumer sale and any written term or acknowledgment, whether part of the contract of sale or not, that purports to negative or vary any of such implied conditions and warranties is void and, if a term of a contract, is severable therefrom, and such term or acknowledgment shall not be evidence of circumstances showing an intent that any of the implied conditions and warranties are not to apply

Section 33 of the same *Act* provides:

> **33.** This Act applies despite any agreement or waiver to the contrary.

I. Title Obligations

Title Obligations Under the Sale of Goods Act

Sale of Goods Act – Section 13

The *Sale of Goods Act* provides that the seller must have the rights to sell the goods at the time when the property is to pass and that the buyer will have and enjoy quiet possession of the goods. Section 13 provides:

> **13.** In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is,
> (a) an implied condition on the part of the seller that in the case of a sale the seller has a right to sell the goods, and that in the case of an agreement to sell the seller will have a right to sell the goods at the time when the property is to pass;
> (b) an implied warranty that the buyer will have and enjoy quiet possession of the goods; and any charge or encumbrance in favour of any third party, not declared or known to the buyer before or atthe time when the contract is made.

The seller will be responsible for things that are independent third-party claims on the right to sell. This means that the right to sell is not just about title matters – it can be about other things that interfere with the buyer's right to deal in the goods.

Niblett Ltd. v. Confectioners' Materials (1921) Eng CA

Facts	Holding	Ratio
○ Seller sold milk and delivered 'Nissly' ○ The buyer was having difficulty selling the milk because it contravened Nestle's rights ○ The buyer had to remove the labels ○ The seller could have sold other kinds of condensed milk, but "Nissly" was one of the accepted listed brands covered by the contract	○ Court considers s. 13(a) – noted above ○ Breach of the right to sell – the notion of the 'right to sell' is extended to mean one's right to be able to deal in the goods ○ Appellants never enjoyed quiet possession of the goods ○ The seller must provide good title, which includes the right to sell	○ Goods tendered must be goods that the vendor has a right to sell ○ Good title includes the right to sell

Rowland v. Divall (1923) Eng CA

Facts	Holding	Ratio
○ A car was sold to an individual and resold by the purchaser to another ○ The car was a stolen car and the police possessed it – the buyer has no car, but he has paid for one ○ The buyer wants the full price back after having use of the car after three months ○ Buyer argues that there was a total failure of consideration ○ Seller argues that a complete rescission must be accompanied by total restitution	○ A buyer cannot rescind a contract and get back the money unless he can restore the subject matter – however, in a case of rescission for the breach of the condition that the seller had a right to sell the goods, it cannot be that the buyer is deprived of his money because he cannot restore the goods, which, from the nature of the transaction, are not the goods of the seller at all, and which the seller therefore has no right to ○ The condition has not changed to a warranty - there has been a total failure of consideration	○ In every contract of sale there is an implied term that a breach of the condition that the seller has a right to sell the goods may be treated as a ground for rejecting the goods and repudiating the contract notwithstanding an acceptance of the contract

Breach or Warranty – Subsection 12(3)

Some argue that the authority in *Rowland* ignores subsection 12(3). Subsection 12(3) is somewhat problematic. This section outlines where a breach of a condition is to be treated as a breach of warranty:

> **12.(3)** Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

Subsection 13(a) of the *Sale of Goods Act* deems the seller to warrant that he has a 'right to sell' and not simply that he has a right to convey title to the goods. It also deems the seller to warrant his title at the time he purports to transfer it to the buyer. Where the seller has breached this condition of title the buyer is entitled to recover the price without any allowance being made for the use of the goods.

J Barry Winsor v. Belgo Canadian Manufacturing (1975) BC SC

Facts	Holding
○ Plaintiff purchased lamps that could not be resold because they did not meet CSA requirements ○ The seller knew that the lamps needed CSA approval	○ The seller was liable as for breach of the implied title obligations ○ This is a breach of the condition that the seller has a right to sell

It is possible in Canadian commercial law to see the 'right to sell' as having a fairly wide coverage so that it will also apply to public law regulations (such as CSA standards).

Microbeads AG v. Vinhurst Road Markings (1975) Eng CA

Facts	Holding
○ Defendants bought some special equipment from plaintiffs between January and April 1970 ○ A patent was published in November 1970 to which the equipment allegedly infringed and an injunction subsequently granted ○ Buyers did not know about the patent ○ Buyers used the machines, but not to their satisfaction and, thus, refused to pay the balance of the price – they were sued ○ Buyers amended their defence so as to set up the infringement as a defence and counterclaim ○ Issue: Was there a breach of contract?	○ The words "a right to sell the goods" means not only a right to pass the property in the machines, but also a right to confer on the buyer undisturbed possession of the goods ○ A the time of the sale in January there was no subsisting patent – the buyer could, at that time, use the machines undisturbed ○ However, the words "shall have and enjoy" apply not only to the time of the sale but also to the future ○ When a buyer has bought goods quite innocently and later on he is disturbed in his possession because the goods are found to be infringing a patent, then he can recover damages for breach of warranty against the seller. It may be the seller is innocent himself, but when one or other must suffer, the loss should fall on the seller ○ **Ratio**: The words "shall have and enjoy" apply not only to the time of the sale but also to future enjoyment

The warranty of quiet possession is not just about problems that existed at the time of sale, it is also for things that could arise in the future. Although both sides were innocent at the time of sale, the warranty of quite possession still operates to correct future problems.

Ahlstrom Canada Ltd. v. Browning Harvey Ltd. (1987) Nfld CA

Facts	Holding
o A bottler of soft drinks placed an order with a manufacturer of bottles for 1.5 litre bottles o The use of the bottles was later prohibited by statute o B shipped the bottles back and brought an action for recovery of the price	o The manufacturer had not breached any of its warranty obligations under the Sale of Goods Act o When the contract was completed the buyer had obtained exactly what it had bargained for – any loss sustained by reason of the ban, imposed some months later against the user of the bottles had to be born by the purchaser

We have seen that the quiet possession provision can continue, as in the case with *Microbeads*, why is it not so in *Ahlstrom*? For things having to do with public regulations there is a point at which you must take the risk of public regulation.

Control issue at the time of sale theory: did the seller know of or have any control over the loss of quiet possession in the future?

Seller's Convention Obligations – Title

The *Convention* provides a completely different treatment relating to breaches of condition. As noted above, Article 49(1)(a) provides that the buyer may declare the contact avoided if the seller performs some fundamental breach. Article 61(1) provides that the seller may declare the contract avoided if the buyer commits some fundamental breach.

Chapter II of the *Convention* provides the obligations of the seller. In general, anything dealing with public law regulation is a matter of quality and will be dealt with the provisions at Article 35. Any question of title that does not fit within these provisions is likely to fit under Article 41.

Article 35 – Quantity, Quality, and Description

> (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
>
> (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
> (a) are fit for the purposes for which goods of the same description would ordinarily be used;
> (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
> (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
> (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods
>
> (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Title is dealt with by the *Convention* more specifically in Articles 41 and 42. However, the *Convention* provisions are much less expansive than the provision found at section 13 of the *Sale of Goods Act*. Article 42 provides a specific provision for intellectual property. More than likely, we see Article 41 referring more closely to ownership and title.

Article 41 – Goods Free From 3rd Party Claim

> The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42

Article 42 starts off by saying that it is the seller's obligation to ensure good title, but there are a number of exceptions: the seller has to deliver goods free of claims, and the seller has to comply with claims that are going to be good in the buyer's jurisdiction.

II. Obligations of Description

Implied Obligation of Description Under the Sale of Goods Act

Sale of Goods Act – Section 14

The *Sale of Goods Act* provides that the seller has a fundamental obligation to supply goods that conform to the contract's description. This obligation is characterized as a condition and, as such, has a remedial consequence that entails the possibility that the buyer may reject the goods. As an implied condition, recall that this particular provision cannot be excluded from a typical consumer contract.

Section 14 of the *SGA* provides that:

> **14.** Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description

The jurisprudence relating to the condition of description might sometimes appear unfair to the seller considering the obligation is treated as a condition.

Andrews Brothers v. Singer & Co. (1934) Eng CA

Facts	Holding	Ratio
○ Plaintiffs wanted a *new* car ○ Car was sold and delivered later; when delivered plaintiff's rep noticed that it had run a considerable distance since time of purchase ○ Plaintiff maintains that this was not a new car ○ The agreement between the parties reads that "all conditions, warranties and liabilities implied by statute, common law or otherwise are excluded" ○ On the strength of this clause the defendant argues that compliance with a description is a condition implied by statute and, therefore, there is no cause of action	○ Does the clause prevent the vendors being liable in damages? ○ Where goods are expressly described in a contract and the delivered goods do not comply with that description, it is quite inaccurate to say that there is an implied term: the term is expressed in the contract ○ There has been a breach of an express term of the contract	○ A party will not be relieved of the obligation to comply with the express terms of a contract by arguing that it has contracted out of the implied statutory rule to comply with the description in the contract

Does an individual always have the right to reject goods that do not correspond with the description? Consider the case where the description might be considered an innominate term – is the description a condition or warranty? Assuming the courts follow the reasoning in *Andrews* it appears that it would be impossible to escape liability where the goods do not correspond with the description. Suppose you had a sale of specific goods. If you had looked at the particular thing you were going to buy and examined it, then that would have been considered a sale of specific goods. The case law since the end of the 19th century has cut back on the meaning of what 'specific goods' is going to cover. Consider the following:

Beale v. Taylor (1967) Eng CA

Facts	Holding
○ Defendant offered for sale a car he believed to be a 1961 Herald	○ In a sale of goods by description there is an implied condition that the goods correspond with the description

convertible by placing an ad o The buyer saw the ad and went to the defendant's home to see the car o Buyer made an offer and seller accepted – car was put in a garage and later found to be made up of two cars (back portion a 1961 Herald and front an earlier model) o Seller denied that the sale was by description – buyer had an opportunity to inspect the goods	o Even where the goods are seen, the sale of goods by description may apply where the deviation is not readily apparent, but even then when the parties are agreed on the thing sold a misdescription of it in the contract may be immaterial o The buyer was coming to see the car as advertised – it was on that basis that he was making the offer o The description was false and it makes little difference that the seller was unaware of the misdescription – he innocently thought it the 1961 Herald o No one could see from looking at the car in the ordinary sort of examination, which would be made that it was anything other than that which it purported to be. It was only afterwards that, on examination, it was found to be in two parts

Speedway Safety v. Hazell & Moore (1982) Aust.

Facts	Holding
o Respondent company was in receivership – appellant's director was interested in buying some of its stock of spare parts – he visited the premises and a contract was later reached o Appellant paid part of the purchase price and later complained that there were errors in the stock-take by the receiver and that some of the items were obsolete or damaged o Appellant refused to pay the balance	o Appellant was not entitled to invoke the implied condition of merchantability o "I do not regard this formula as establishing a sale by description ... the use of the words 'stock' identifies the goods … But it cannot be extended to answer the further requirement that a description properly so-called indicates a class or asserts some attribute or quality to which the goods must correspond

Arcos Ltd. v. E.A. Ronaasen and Son (1933) HL

Facts	Holding	Ratio
o Sellers agreed to sell to the buyers wood as specified in a contract o The wood was to be used for making cement barrels, a use the sellers were aware of o The wood was inspected some time later and only about 5 per cent corresponded with the description o The buyers examined the goods and rejected them on the basis that they were not of the description	o *Issue*: Whether the goods when shipped complied with the implied condition that they should correspond with the description o Conditions referring to weight, measurement and the like must be complied with – the seller who wants a margin must stipulate o Whether or not the goods were fit for the particular purpose is insignificant bearing in mind the failure to meet the contractual condition	o A man may require goods for a particular purpose and make it known to the seller so as to secure the implied condition of fitness for that purpose, but there is no reason why he should not abandon that purpose if he pleases and apply the goods to any purpose for which the description makes them suitable o If goods do not correspond with the description there seems no reason why one should not reject them if convenient to do so

If there is a problem with the description, the buyer has the right to reject. Meeting the condition, however, implies a contract of sale. If we have got something that we can call contract description, which can refer to a number of qualitative and quantitative things, those are going to be classified as part of the description and they will be seen as conditions. This is a fairly standard approach in sales cases. From the perspective of the buyer, this means that the buyer has the highest form of remedy when there is a problem with the description.

When you have this approach for the seller, when the buyer has the right to reject, we are perhaps creating certainty, but there is a danger that we are creating commercial difficulty.

Seller's Convention Obligations – Description

The *Convention* deals with the issue of contractual description in various ways. First consider whether or not the delivery of the goods being delivered, as not complying with the description, would amount to a fundamental breach of the contract. Recall that under Article 49(1)(a) the buyer can declare the contract avoided if the failure to perform some condition of it would amount to a fundamental breach.

More specifically, Articles 30 and 35 provide a framework regarding the seller's obligation to deliver goods as required by the contract in terms of quantity, quality, and description.

Article 30 – Obligation to Deliver

> The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

Article 35(1) – Quantity, Quality and Description

> The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract

III. Merchantability

Implied Obligation of Merchantability Under the Sale of Goods Act

Sale of Goods Act – Subsection 15(2)

Merchantable quality is found at subsection 15(2), which provides:

> **15.(2)** Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed

That the good are merchantable is impossible to exclude in a consumer transaction as per the *Consumer Protection Act*. Under any other sale this is an implied condition unless it is varied or otherwise excluded.

What exactly is meant by merchantability?

Hardwick Game Farm v. Suffolk Agricultural (1969) HL

Facts	Holding	Ratio
○ Ground nut extraction, which was compounded in animal feed was poisonous to some poultry ○ The feed was fine for cattle ○ Nobody in the business knew of the danger at the time of sale ○ The ground nut extraction in this particular year had a high concentration of the toxin ○ Hardwick went belly up and the seller was trying to claim up the chain	○ *Issue*: Is this feed merchantable? ○ The condition of merchantability will apply – There is here a latent defect as at the time of delivery nobody knew of the problem ○ The good is merchantable ○ This is the seller's rule: merchantability does not mean that you have to satisfy all the potential consumers out there – but instead meet some of the potential purposes ○ In order for the feed to merchantable the good has to be good for at least one of its purposes ○ *Dissent*: This is not merchantable at the time of delivery	○ To make something merchantable, it only has to be made saleable in the market – it only has to fulfill/meet one of the usual purposes

Cammel Laird v. The Manganese (1934) AC

Facts	Holding
○ Not Done	○ Merchantable quality means that the goods in the form in which they were tendered were of no use for any purpose for which such goods would normally be used and hence were not saleable under that description

Canada Atlantic Grain Export v. Eilers (1929) Eng

Facts	Holding
○ Not Done	○ If goods are sold under a description which they fulfill, and if goods under that description are reasonably capable in ordinary use of several purposes, they are of merchantable quality if they are reasonably capable of being used for any one or more of such purposes, even if unfit for use for that one of those purposes which the particular buyer intended

Suppose an individual enters into a contract to buy a car and when it arrives it is scratched and dented, but the individual entered into a contract to buy a brand new car – not what the individual expected. Is the car merchantable? Is it of no use for what the individual intended? The individual can still drive it, can s/he not? The use criterion does not actually get at everything. The lower quality product still yields some use.

Australian Knitting Mills v. Grant (1933) Aust

Facts	Holding
○ Not Done	○ The condition that goods are of merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonable sound order and condition and without special terms

The *Sale of Goods Act* in Canada is still the early version as it was interpreted in *Hardwick.* In Canada, merchantability requires saleability in the market meeting only one of the intended purposes.

B.S. Brown & Son Ltd. v. Craiks Ltd. (1970) HL

Facts	Holding	Ratio
○ Textiles were ordered, but there appears to have been a misunderstanding about what the specifications of the order meant ○ The seller thought the textile would be used for an industrial purpose and did not provide a high quality material ○ The buyer intended to use the textile for clothing and it was, as such, unsuitable for manufacture	○ Both views were reasonable and the price was in the middle – not so high that it should have been known that the textile was for clothing and not so low that it was intended for industrial use ○ Price is perhaps something to consider – but it is not determinative ○ The goods would normally have been used for industrial purposes and were suitable for that, and the sellers acting in good faith delivered such goods	○ The test for merchantability is that found in *Hardwick* ○ Goods are merchantable under a particular description if they are fit for any one of the purposes listed

IBM v. Shcerban (1925) Sask CA

Facts	Holding
○ A computing skill showed up missing a glass dial – the buyer rejected the machine ○ The first machine offered did not meet the contract ○ This was the second machine ○ The scale itself was worth $300 and the dial approximately 25 cents	○ The scale was not merchantable ○ There must have been some reason for the glass cover – it serves a useful purpose beyond mere aesthetics – not *de minimus* and why should the buyer fix it? ○ *Dissent*: The buyer was looking to find an excuse to get out of the sale

Merchantability and Motor Vehicles

Bartlett v. Sidney Marcus Ltd. (1965) Eng CA

Facts	Holding	Ratio
○ Plaintiff bought a second-hand Jaguar ○ Salesman noticed deficiency and relayed information to buyer ○ Plaintiff buyer took car in to get	○ *Issue*: Were the repairs needed enough to render the automobile as not merchantable? ○ The sale of a second-hand car is merchantable so long as it is	○ Something is not merchantable if it is of no use for any purpose for which such good would normally be used ○ Merchantability requires that the

fixed after accepting an abatement and found the cost to fix far exceeded the abatement in price	usable, it need not be perfect	good be fit for *a* use

Merchantability and Durability

Standard Shipping Terms

F.O.B. – Free on Board – the seller is only looking after transportation up until the good is transported to the ship
C.I.F. – Cost Insurance and Freight – the seller is getting the goods onboard the ship, covering the cost of the goods, insurance on the voyage, and freight on the voyage
C & F – Cost and Freight – the seller is not looking after the cost of insurance

We have developed these standard terms so that the parties can quote them to each other and everybody knows what exactly is being talked about. What happens when the goods have to be transported, are merchantable when they leave the seller, but are not merchantable by the time they reach the buyer?

Mash & Murrel v. Joseph Emanuel Ltd. (1961) Eng QB

Facts	Holding	Ratio
○ The sale was C&F to Liverpool ○ The potatoes had been shipped a distance ○ Upon arrival in Liverpool, the potatoes were found unfit for human consumption ○ There was nothing in particular that had gone wrong on the ship – the voyage was usual	○ *Issue*: When do the potatoes have to be fit for human consumption? ○ The ordinary understanding is that the potatoes would have to be fit beyond the point of delivery – this is a sale intended to be useful for human consumption ○ Merchantability lasts for a period of time	○ Merchantability must last for a period of time – the goods, to a certain extent, must be durable in order to be merchantable ○ Merchantability in the case of goods sold c.i.f. or c.&f. requires the goods to remain merchantable for a reasonable period of time ○ Reasonable time means time for arrival and disposal upon arrival

This case got reversed on Appeal because there was an identified cause of the problem. This was not a normal voyage, the potatoes had been traveling in an unventilated hold for approximately 5-6 days, which was at the buyer's risk.

Fording Coal v. Harnischfeger (1990) BC CA

Facts	Holding
○ An electric mining shovel had been used for five years and broke down ○ A small component was the problem ○ *Trial*: The implied conditions of fitness for purpose and merchantability were breached – without an exclusion the conditions would be implied and the machine clearly did not last for its anticipated lifetime	○ Part of the notion of durability is that the electric shovel would work for a period of time ○ Merchantability and fitness both extend to this notion of durability ○ The defect occurred at the time of the sale and the failure occurred well before the machine's anticipated life span ○ The failure of the roller was a breach of the implied condition of durability ○ Fitness is required not merely on the date of sale, but for the reasonably anticipated life span of the goods, provided that they are used throughout their life span for the purpose intended

Manchester Lines v. Era Ltd (1922) HL

Facts	Holding
○ Not Done	○ If the particular purpose is made known by the buyer to the seller, then, unless there is something

	in effect to rebut the presumption, that in itself is sufficient to raise the presumption that he relies upon the skill and judgment of the seller

Beer v. Walker (19__) Eng

Facts	Holding
○ Rabbits were sent from London to Brighton – they were merchantable when sent from London, but when delivered were putrid and valueless	○ The implied warranty of merchantable quality extends to the time, in the ordinary course of transit, that the rabbits should reach the buyer, and not only to that time, but also it should continue until the defendant has a reasonable opportunity of dealing with them in the ordinary course of business

Compliance with Public Law of Buyer's Jurisdiction

Summer, Permain & Co. v. Webb & Co. (1922) Eng CA

Facts	Holding	Ratio
○ While a tonic could be sold in England, it contained an ingredient that was regulated in the place where the buyer was planning to sell – it could not be sold commercially in Argentina ○ Both parties knew the goods were to be sold in Argentina ○ The buyer was arguing breach of merchantability	○ The question of public regulation is not a question of merchantability ○ *The buyer had not argued a right to sell* ○ The question of meeting public regulation is a question of a right to sell and not merchantability ○ It would not be fair to expect the seller to meet the laws of all of the jurisdictions where the goods might eventually end up	○ It would not be fair for a seller to have to know all the potential laws relating to the goods as treated by the buyer ○ Merchantable quality means that the goods comply with the description in the contract, it does not mean that there shall in fact be a person ready to purchase the goods

Egekvist Bakeries v. Tizel & Blinick (1950) ON CA

Facts	Holding	Ratio
○ A seller from Toronto at the time of the sale had already shipped blueberries to Chicago and already under customs control – they were not supposed to be sold ○ The seller had ignored customs control and sold the blueberries and shipped them – when they arrived they were unfit for human consumption	○ The seller was found liable for breach of a right to sell ○ The court applied *Niblett* and held that the defendant had no right to sell ○ It was the plaintiff's responsibility to discharge the customs condition – the delay was reasonably foreseeable	○ A person selling goods in a foreign market does not impliedly warrant that he has a right to sell them in that market, but that warranty is different from the case of a vendor selling f.o.b. to a foreign market with the knowledge that s/he cannot lawfully sell in that market until s/he has discharged some legal condition

Seller's Convention Obligations – Merchantability (Quality)

Article 35 – Quality

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the **purposes** for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Consider that paragraph 35(2)(a) uses the word "purposes" and not "purpose" – a plural use of the word. The *Convention* does not take the minimalist approach that was adopted in *Hardwick*, but rather requires the goods to be fit for all the purposes it sets out in its description thereby rejecting Lord Reid's approach.

Article 36 – Conformity Over Time (Durability)

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

This notion of meeting the requirements also includes durability even though the lack of conformity only becomes apparent after some time. The *Convention* confirms the notion of durability similar to what was seen in *Fording* and it also confirms that for sales covered by the convention that merchantability requires the goods are fit across the range and not just the lowest standard.

IV. Fitness for Purpose

Implied Obligation of Fitness for Purpose Under Sale of Goods Act

Merchantability is concerned with when goods are bought by description from a seller dealing with goods of that description. However, the wording of fitness for purpose deals with something more specific in that the buyer relies on the seller's skill and judgment. Fitness for purpose requires that the buyer makes known to the seller what purpose the goods will be used for in reliance on the seller's skill of selection.

Sale of Goods Act – Subsection 15(1)

> **15.** Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
>
> **(1).** Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether the seller is condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

What qualifies for a particular purpose? How can it be that goods are merchantable, but not fit for a particular purpose?

Hardwick Game Farm v. Suffolk Agricultural (1971) HL

Facts	Holding	Ratio
○ See Above ○ Hardwick argued that it had a standing relationship with Suffolk – they knew what business they were in and knew that the ingredients would be used for both cattle and poultry food	○ You do not need specific circumstances to show reliance on a particular purpose ○ A simple inference of partial reliance is enough ○ The court could infer partial reliance to bring in ingredients that are healthy and of good quality for *both* cattle and poultry food ○ The goods were not reasonably fit for the general purpose ○ While the goods' toxicity was not known, it was particularly dangerous	○ A simple inference of partial reliance of the buyer on the seller is enough to enable the application of the fitness for purpose provision ○ Once something is qualified as being acquired for a particular purpose and it is found it is dangerous for any part of that purpose, then the goods will not be considered fit for that purpose

This case uses a narrow test for merchantability, but a wide scope for fitness for purpose. The result is controversial: on the one hand, criticisms that the approach for merchantability is too narrow and, on the other hand, saying that the condition for fitness for purpose should be construed widely. A reading of subsection 15(1) would make it appear that we have a narrow approach. In the following case, the approach is so wide that we start getting dissents.

Ashington Piggeries Ltd. v. Christopher Hill Ltd (1972) HL

Facts	Holding
o Some feed supplied from Norway was compounded in England by a compounder and sold to Ashington o The ingredients were supplied by Hill in accordance with a formula prepared by Ashington o The food as compounded, when fed to the mink, had a contaminant that was very harmful to the mink resulting in death	o The seller ought to be liable for defects - There was sufficient reliance upon the sell for him to be liable for fitness for purpose. o The buyer relied on the seller's expertise to provide feed acceptable for the purpose o The buyer was able to demonstrate that the food was generally unsuitable for animals while the seller was unable to demonstrate that the food would have been fit to feed animals other than mink – You don't have to show that the meal killed the other species, but only that it was harmful to others o The suppliers knew of the purpose and ought to have known that the buyer's were in reliance upon the seller's to provide a product reasonably fit for the purpose o Just about anything can be a particular purpose – it is typically simple to find a breach of fitness for purpose

Patent or Trade Name Exception

Subsection 15(1) provides that in the case of a contract for the sale of a specified good under the patent or trade name, there is no implied condition of fitness for any particular purpose. However, there is a practical approach in modern commercial law.

Baldry v. Marshall (1925) Eng CA

Facts	Holding	Ratio
o Buyer asked for a Bugatti eight-cylinder car o There was a problem with the car o The buyer argues on the basis of fitness for purpose	o It was not just the trade name that the buyer was relying on – the buyer had indicated that he wanted to use the car for particular purposes o Did the buyer specify the good under its trade name so as to indicate that he is satisfied that it will answer his purpose and that he is not relying on the skill or judgment of the seller?	o A buyer only takes all responsibility when s/he specified a trade name so as to show that there is absolutely no reliance on the seller's skill or judgment – if there is something more s/he does not assume all responsibility

We have seen some movement in the decisions towards wider responsibility for sellers under fitness for purpose, the condition that the seller has the right to sell the goods, and the condition that goods meet the description. When those implied conditions are made an obligatory part of the contract, we put a fairly onerous responsibility on the seller.

Seller's Convention Obligations – Fitness

Article 35(2)(b) – Fit for Purpose

> (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
>
> (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstance show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment

One could still expect in the situation of *Ashington* that you would probably still get liability on this wording unless there is some exclusion or some other circumstance.

Seller's Delivery Obligations

Duties Relating to Delivery Under the Sale of Goods Act

Delivery means the voluntary transfer of possession from one person to another. The seller's basic obligation to deliver the goods conditions *prima facie* a right to payment and acceptance by the buyer. Delivery affects the seller's lien rights and the rights of third parties who deal in good faith with a buyer who has been entrusted with goods or with documents of title thereto. In the case of a sale of future or unascertained goods, delivery usually coincides with transfer of title, and therefore determines the time for the transfer of risk.

Delivery and payment are generally assumed to occur at the same time. Upon delivery, risk and title will be transferred – this is something that may simply be assumed.

Section 26 – Duty of Delivery and Acceptance

> **26.** It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale.

Section 27 – Concurrency of Delivery and Payment

> **27.** Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

Section 28 – Rules as to Delivery

> **28.**--(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties, and apart from any such contract, express or implied, the place of delivery is the seller's place of business, if there is one, and if not, the seller's residence, but where the contract is for the sale of specific goods that to the knowledge of the parties, when the contract is made, are in some other place, then that place is the place of delivery. *Rules as to delivery*
>
> (2) Where under the contract of sale the seller is bound to send the goods to the buyer but no time for sending them is fixed, the seller is bound to send them within a reasonable time. *Where no time for delivery fixed*
>
> (3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by the seller to the buyer unless and until such third person acknowledges to the buyer that the goods are being held on the buyer's behalf, but nothing in this section affects the operation of the issue or transfer of any document of title to goods. *Where goods in possession of third party*
>
> (4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour, and what is a reasonable hour is a question of fact. *Demand or tender*
>
> (5) Unless otherwise agreed, the expenses of and incidental to putting the goods in a deliverable state shall be borne by the seller. *Deliverable state*

Time of Delivery

Section 11 – Time of the Essence Where Stipulated

> **11.** Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not of the essence of a contract of sale, and whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

Hartley v. Hymans (1920) Eng KB

Facts	Holding	Ratio
o Not Done	o The time of delivery in a mercantile contract is going to be seen as a condition – it is of the essence of a contract "time is of the essence" o The buyer can reject if the seller does not deliver the goods on time	o Time is of the essence in a contract where so stipulated – section 11 o For a mercantile contract, time of delivery is of the essence – it becomes a condition

From this case we can draw the following conclusions: time of delivery is of the essence in a mercantile contract even where the contract does not provide for the time of delivery to be of the essence. In a mercantile contract, time of delivery is a condition of the contract. The innocent side will have the opportunity to rescind the contract and get out of the deal – if the seller is late the buyer is entitled to reject. In a consumer transaction time will not be of the essence unless stipulated as of the essence in the contract.

Allen v. Danforth Motors (1957) ON CA

Facts	Holding	Ratio
o The buyer purports to reject because the car is allegedly delivered late o There was an oral representation at the time of purchase that the car would be ready in two or three days – an agreement of short delivery o The car was delivered in ten days o There is a merger clause indicating that there are no warranties and representations except as stated in writing	o What do you do with the notion that time is a 'reasonable' time? o **Trial**: in favor of buyer – car was not there in 2-3 days and the contract ought to be rescinded o **Appeal**: the buyer was unreasonable in rejecting the car in showing up just a few days later o The oral evidence should not have been admitted to bury the terms of a written contract, but the term about time really is a reasonable time that gets implied into the contract o There should be a reasonable time for the time of delivery – the car had arrived in a reasonable time after the order	o Where a time is stipulated in the written contract for delivery, time is of the essence and failure to deliver on that date can result in rescission – an oral representation of time will be inadmissible to vary a written contract o Where a time is not stipulated in the contract the goods must only be delivered within a reasonable period of time

Consider the *Business Practices Act*, subsection 4(7) which provides:

> "In the trial of an issue under subsection (1), oral evidence respecting an unfair practice is admissible despite the fact that there is a written agreement and despite the fact that the evidence pertains to a representation of a term, condition or undertaking that is or is not provided for in the agreement"

Why couldn't an oral representation be admitted in this case? Recall that the party wishing to admit the evidence would have to show an *unfair practice*. A representation about the time when the goods will be delivered is not listed under the enumerated 'unfair practices' in the *Business Practices Act*.

In the common law relating to sales, delivery runs concurrently with payment – the goods are handed over and payment is given. It is possible to have one of the essence and the other not, but the simple connection still exists. Another assumption is that we connect title and risk together so that if title is passing at a different time, risk is passed along with title. It can be said, in a common sense approach, that ownership goes along with risk. The Act is drafted on the basis that delivery and payment are run concurrently while title and risk are connected.

Chas. Rickards Ltd. v. Oppenheim (1950) Eng CA

Facts	Holding	Ratio
○ A Rolls-Royce chassis was built specifically for the buyer ○ Time was of the essence in the contract, but the provision was waived a few times by the buyer ○ By the end of June the purchaser is told that the chassis will not be ready for another few weeks – the buyer delivered an ultimatum: if the car is not delivered in four weeks he will not take it ○ The car was not delivered in four weeks, when delivered the buyer refused delivery	○ *Issue*: Could the buyer re-instate time of the essence? ○ Time was clearly of the essence of the original contract ○ Just because the defendant was lenient and waived the initial expressed time, he should not be prevented from thereafter insisting on reasonable delivery ○ The buyer is entitled to give reasonable notice making time of the essence of the matter ○ Four weeks notice was reasonable and, hence, the defendant had the right to refuse delivery	○ A party to the contract will not be estopped from re-instating time is of the essence where he waives the right initially so long as he gives reasonable notice making time of the essence once again

One of the considerations is the custom level of the subject matter of the contract – the mercantile operates on the assumption that time is of the essence in mercantile contracts, which is fine for common products, but is a problem for the complex goods that are specifically made for a particular buyer.

Mercantile Shipping Terms

In a survey of common shipping terms and their use, the Law Reform Commission was considering whether or not such terms should be included in sales legislation. The American States' UCC have provisions that list a number of terms. The competing model is the *Incoterms* model from the International Chamber of Commerce. This is simply a harmonization model so that parties involved in international trade transactions know what is being talked about and agreed to – a way for allowing short-form communication.

Beaver Specialty v. Donald H. Bain (1974) SCC

Facts	Holding	Ratio
○ There is a negotiation between parties in T.O. for walnuts ○ There are a number of documents that get put together to form the contract – one with f.o.b. clause When the walnuts were shipped across the prairie they froze ○ By the time the walnuts got from Vancouver to Toronto, the buyer rejected them because they had become unmerchantable	○ *Issue*: Whose risk was the freezing of the walnuts? ○ The analysis moves to who had title – risk and title go together ○ Whoever had title would have the risk – who had title and when? ○ Title is considered at section 19 ○ Section 19 Rule 5 did not help – the intention of the contract was that delivery was not until the goods arrived in Toronto ○ Neither property nor risk was to pass until the goods arrived in Toronto	○ Risk will attach to the person who has title at the critical moment ○ Title passes upon delivery

Section 19 – Rules for Ascertaining Intention

19. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1.--Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery or both is postponed.

Rule 2.-- Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.

Rule 3.--Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

Rule 4.--When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer;

(i) when the buyer signifies approval or acceptance to the seller or does any other act adopting the transaction;

(ii) if the buyer does not signify approval or without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time, and what is a reasonable time is a question of fact.

Rule 5.--

(i) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer, and such assent may be expressed or implied and may be given either before or after the appropriation is made.

(ii) Where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier not) for the purpose of transmission to the buyer and does not reserve the right of disposal, the seller shall be deemed to have unconditionally appropriated the goods to the contract.

Subsection 31(1) – Delivery to Carrier

31.(1) Where in pursuance of a contract of sale the seller is authorized or required to send the goods to the buyer, the delivery of the goods to a carrier whether named by the buyer or not, for the purpose of transmission to the buyer, is, in the absence of evidence to the contrary, delivery of the goods to the buyer.

Subsection 31(2) – Contract with Carrier

> **31.(2)** Unless otherwise authorized by the buyer, the seller shall make a contract with the carrier on behalf of the buyer that is reasonable having regard to the nature of the goods and to do and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to the buyer or may hold the seller responsible in damages.

Winnipeg Fish Co. v. Whitman Fish Co. (1909) SCC

Facts	Holding
o Fish was going from Nova Scotia f.o.b. to Winnipeg	o The buyers get to reject if something happens to the product in the meantime – title remains with the seller until Winnipeg and, thus, risk attaches until the goods arrive in Winnipeg o Goods f.o.b. are delivered upon arrival

Section 29 – Wrong Quantity or Quality

> **29.**--(1) Where the seller delivers to the buyer a quantity of goods less than the seller contracted to sell, the buyer may reject them, but if they are accepted, the buyer shall pay for them at the contract rate. *Delivery of wrong quantity*
>
> (2) Where the seller delivers to the buyer a quantity of goods larger than the seller contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or may reject the whole, and if the buyer accepts the whole of contract rate. R.S.O. 1990, c. S.1, s. 29 (1, 2). *Quantity larger than contracted*
>
> (3) Where the seller delivers to the buyer the goods contracted to be sold mixed with goods of a different description not included in the contract, the buyer may accept the goods that are in accordance with the contract and reject the rest, or may reject the whole. *Goods not in accordance with contract*

Delivery Under the Convention

The default position under the *Convention* is to provide for delivery to the buyer's place of business. Article 31, however, provides considerations where delivery is to take place (in other words, the seller discards the goods) at a place other than the buyer's place of business.

Article 31 – Delivery Other than Place of Business

> If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:
>
> (a) if the contract of sale involves carriage of the goods - in handing the goods over to the first carrier for transmission to the buyer;
>
> (b) if, in cases not within the preceding subparagraph, the contract related to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place - in placing the goods at the buyer's disposal at that place;
>
> (c) in other cases - in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Article 52 – Wrong Quantity and Early Delivery

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

Documents of Title

Bill of Lading

Bill of Lading – what you get in an old-fashioned shipment when the seller has taken the goods to harbor and arranged for their placement on the ship. The practice has been to treat the bill of lading as a document to title. The document could be transferred over so that the purchaser would have the bill to receive the goods. The document performs the function of being a document of title representing the right to receive the goods when they arrive at the destination. Notice does not have to be given to the carrier of the transfer – whoever has the piece of paper can go to the ship and get the goods. The bill of lading represents the right to possession of the goods and transfer of the bill of lading is as effective as transfer of the goods themselves. The bill, however, is not a negotiable instrument. Negotiability has the quality of a commercial instrument to create a better right in the purchaser than the seller had – there are some commercial instruments, such as cheques and promissory notes, that have this quality: the innocent third-party purchaser for value is able to defeat previous equitable claims. We are protecting the property interest and ownership – the individual can transfer, but s/he can only transfer that which he has – *nemo dat non curat lex.*

Warehouse Receipts

These are treated similarly to bills of lading in the common law, but there are some legislative provisions that apply to them. The *Warehouse Receipts Act* provides that a warehouse receipt holder receives the benefit of the obligation of the warehouseman to hold possession of the goods for him.

Subsection 20(2) – Reservation of Right of Disposal

> **20.(2)** Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or the seller's agent, the seller in the absence of evidence to the contrary reserves the right of disposal

When does the risk pass in a long-distance shipment? Once the goods have been placed on boards is one option. As a practical matter we need to have the risk all as one entity – even though we see that the common law has some assumptions, the usual assumption in a document of title sale is that, "risk goes by the rail". In other words, risk passes at the time of shipment.

Risk of Loss

Risk Under the Sale of Goods Act

Section 21 – Risk Passes with Property

> **21.** Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but, when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not

The goods are at the seller's risk until the goods are transferred and at the buyer's risk when they are transferred whether delivery has taken place or not. The usual assumption under the *Act* is that risk and title go together. Thus, when goods are destroyed or damaged you must pinpoint who had title.

Jerome v. Clements Motor Sales (1958) ON CA

Facts	Holding	Ratio
○ There was to be a trade-in for a new car ○ The intended buyer was driving one of the intended trade-ins after trading one in and paying over cash – the certificates had been handed over as well ○ There were some repairs to be done on the new car – the only thing left to do was to take the battery from the latest trade-in to the new car, which would happen when she went to pick up the car ○ Overnight, on July 11th, the shop, store-room, and repair shop burnt down	○ *Issue*: Where was the risk – can the buyer get out of the sale? ○ The seller wants to argue that property has passed – s/he has done everything that was to be done – property having transferred it should be at buyer's risk ○ With ascertained goods, the title passes at such time as the parties intended it to be transferred ○ Section 19, Rule 2 provides that a seller is bound to do something for the purpose of putting the ascertained goods into a deliverable state – notice must be given to the buyer once this thing is done	○ A seller can only give notice to a buyer that the goods are in a deliverable state once they are, in fact, in a deliverable state ○ Section 19, Rule 2 – If the seller is bound to put goods into a deliverable state, title cannot pass until that thing is done and the buyer is given notice that the goods are deliverable ○ Unless otherwise stated in the written contract, title will not pass from the seller to the buyer until all of the buyer's obligations are complete

Even if the seller has performed all of his/her obligations under the contract, title will not pass until s/he gives notice to the buyer that all the obligations have been fulfilled. In this case, until the battery was transferred into the new car (which could not be done until the purchaser returned with the old trade-in) and notice of completion was given, the title could not pass from the seller to the purchaser.

Risk of Loss Due to a Party's Breach

A difficult question is whether and to what extent the normal rules of a risk of loss should be modified when one or the other party is in breach of his/her contractual obligations at the time of loss. The only express provision deals with a delay in delivery.

Subsection 21(a) – Delay in Delivery

> **21.(a)** where delivery has been delayed through the fault of either the buyer or seller, the goods are at the risk of the party in fault as regards any loss that might not have occurred but for such fault

Risk is linked to delivery where there has been a delay in delivery, damage occurs in the intervening delayed period, and one of the parties is at fault for causing the delay.

Allied Mills v. Gaydie Valley Co. Ltd. (1978) NSW CA

Facts	Holding	Ratio
o A sale of some linseed meal o The goods were identified and agreed on at the time of sale – specific goods in deliverable state o Property had passed to the buyer immediately s.19, rule 1 o The goods were not delivered – they were late and a fire destroyed the goods	o The court found complete liability on the seller because s/he delayed delivery o The court hesitates to call the seller a bailee o There is no transfer of risk, even if title passes, if by the fault of one of the parties delivery has been delayed	o Section 21(a) protects the non-offending party where the goods have yet to be delivered. The risk is tied to possession of the goods and although the title may have passed to the purchaser, the court will not impose a penalty or loss on the purchaser where, because of the fault of the seller, the goods have yet to be delivered.

The Convention on Risk

Chapter IV of the *Convention* deals with the passage of risk. Articles 66 through 70 provide the framework for risk in an International Sale.

Article 66 – Obligation to Pay After Passing of Risk

> Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 67 – Passage of Risk Upon Delivery to Carrier

> (1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk
>
> (2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

Article 68 – Goods Sold in Transit

> The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

Article 69 – Risk Upon Delivery

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

Article 70 – Remedies Not Impaired by Fundamental Breach

If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

Transfer of Title

Transfer of Title Under the Sale of Goods Act

The focal role in sales law is to transfer property from buyer to seller. Determination of time of transfer of title turns on very subjective factors in the SGA making predictions of potential litigious issues very difficult. These factors are addressed in sections 17 18 where title cannot pass before the goods have been ascertained, and when so, the parties' own intentions govern as to the time of transfer. Where the intention of the parties cannot be ascertained we must move to section 19.

Section 17 – Goods Must be Ascertained

> **17.** Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer until the goods are ascertained.

Section 18 – Property Passes Where Intended to Pass

> **18.**(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

Section 19 – Rules 1, 2, and 5 – Rules for Ascertaining Intention

> **Rule 1**.--Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery or both is postponed.
>
> **Rule 2**.-- Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.
>
> **Rule 5**.--
> (i) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer, and such assent may be expressed or implied and may be given either before or after the appropriation is made.
>
> (ii) Where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier not, for the purpose of transmission to the buyer and does not reserve the right of disposal, the seller shall be deemed to have unconditionally appropriated the goods to the contract.

Section 19 Rule 1 – Specific Goods in a Deliverable State – Title passes when the contract was made

Section 19 Rule 2 – Specific Goods with Remaining Seller Obligations – Title passes when put in deliverable state

Section 19 Rule 5(i) – Unascertained or Future Goods – Title passes when the contract was made

Royal Bank of Canada v. Saskatchewan Telecommunications (1985) Sask CA

Facts	Holding	Ratio
○ Saskatchewan contracted for the construction of buildings to be constructed on Tritec's premises ○ Tritec was put into receivership and the buildings were released to Saskatchewan for $20,000 ○ Parties agreed that if title passed before Tritec was put into receivorship, the $20,000 would be returned ○ Progress payments were being made	○ *Issue*: When did the building pass from Tritec to Saskatchewan Telecommunications? ○ There was no contractual provision indicating when title passed ○ Progress payments are a useful method of determining when the unfinished goods had been appropriated, but not proof by itself of the intent of the parties ○ Since there is no indication of intent between the parties, title will pass when the goods are in a deliverable state ○ Saskatchewan had not acquired title in the buildings before Tritec went into receivership	○ If the parties do not indicate when title is to pass, the rules will be governed by statute ○ In a sale for specific goods where the seller has an obligation to perform, title does not pass until the seller has done that which s/he is obligated to do

Carlos Federspiel & Co. v. Chas. Twigg & Co. (1957) QBD

Facts	Holding
○ Plaintiff carries on business in Costa Rica and defendant is the manufacturer of children's bikes in England ○ Plaintiff paid the price of the contract and the goods were to be delivered by the defendant ○ Defendant was put in receivership ○ Receiver refused to deliver the goods that were the object of the contract between the plaintiff and defendant	○ *Issue*: Whether or not the goods were appropriated to the contract by the sellers with the consent of the buyers so as to pass ownership to the buyers ○ The parties intended that the shipment of the goods should be a decisive act of performance by the seller ○ The court reasoned as follows: 1. Section 18, Rule 5 (our s. 19, r.5) is one of the rules for ascertaining the intention of the parties as to the time at which the property in the goods passes, unless a different intention exists. So the element of common intention has always to be borne in mind. 2. A mere setting apart or selection of the seller of the goods which he expects to use in performance of the contract. To constitute an appropriation of the goods to the contract, the parties must have had, or be reasonably supposed to have had, an intention to attach the contract irrevocably to those goods, so that those goods and no others are the subject of the sale and become the property of the buyer 3. It is by agreement of the parties that the appropriation, involving a change of ownership, is made. 4. An appropriation by the seller, with the assent of the buyer, may be said always to involve an actual or constructive delivery. If the seller remains in possession he becomes a bailee for the buyer 5. Under s.20 of the SGA (s.21 of our Act) ownership and risk are normally associated. So, where the goods are at the seller's risks, that is a prima facie indication that the property has not passed to the buyer 6. Usually, but not necessarily, the appropriating act is the last act to be performed by the seller ○ The Court decided that the intention of the parties was that ownership was to pass on shipment since it appeared to be an obligation of the seller for the performance of the contract – there was no actual or constructive delivery

Caradoc Nurseries v. Marsh (1959) ON CA

Facts	Holding	Ratio
○ Buyer visited place of business, ordered trees, and tagged only one ○ The buyer refused to take delivery of trees and shrubs the plaintiff had picked out and tendered for delivery	○ The property has passed ○ The seller did all that he was supposed to do under the contract ○ There was no appropriation up until delivery – once goods are appropriated to the contract, the buyer cannot cancel; title has passed	○ Title in a sale of unascertained goods passes once goods are appropriated to the contract ○ A buyer may cancel a contract before the goods are appropriated to it, but may not reject the goods once appropriated because title has passed

Sells v. Thomson (1914) BC CA

Facts	Holding
○ A contract for the sale of 25 volumes of books from England to Vancouver ○ After the delivery of the 12th volume, the buyer provided notice to the seller that he wanted to cancel ○ The seller ignored the books and thereafter appropriated the remaining volumes to the contract and tendered them for delivery ○ Seller demands the price	○ Although the buyer may be liable for breach of contract, s/he is nevertheless entitled to cancel or reject the goods before title passes to him/her ○ When the buyer sent his notice of cancellation the seller should instead have looked to resell the books elsewhere and mitigate any damage ○ The seller would then be entitled to proceed for damages

In Re Wait (1927) Eng CA

Facts	Holding
○ A buyer who is awaiting the delivery of wheat has already paid and made a sale of the wheat ○ The buyer learns that his vendor is about to go bankrupt and a receiver has been appointed ○ Buyer brings an action for specific performance of the contract	○ Specific performance is only available for ascertained goods ○ The buyer purchased wheat, not any particular wheat ○ The beneficial interest in goods does not pass to the purchaser until they have become identifiable goods ○ The goods can only pass when goods in a deliverable state are appropriated to the contract

Consequences of the Passing of Property

1. Buyer will get good title even if seller goes broke w/ goods in his hands;
2. If the seller reserves title, he will maintain title if buyer goes broke;
3. Right to sue a third party for loss of or damage to goods may depend on who has the property;
4. Risk passes when property passes;
5. Generally, the seller can only sue for the price if the property has passed;
6. Where the contract involves a sale of specific goods, title in which passed to the buyer, the buyer may lose his right of rejection

On the other hand, the passing of property does not affect:
1. Buyer's non-entitlement to possession until he has paid the price (ss. 27, 39)
2. Power of a seller in possession to pass good title to a third party acting in good faith without notice (s. 25(1)).
3. The seller's possessory lien for the unpaid price and the right to resell the goods in case of default (s.46(3)).
4. The buyer's right to reject non-conforming goods (SGA ss. 33-34) and;
5. The locus of the risk of loss where delivery has been delayed through the default of one of the parties (s.21(B)).

Title can pass only when the goods are specific or ascertained. Specific goods are those agreed upon at the time of sale, while ascertained goods are when the type of good is known. Also, there is a general reluctance in the courts to say that property had passed until the seller has completed all of its performance.

There are a number of contexts in which property is an importance concept:

1. *Prima facie*, risk is going to go with property;
2. The seller can only sue for the price once property has passed;
3. When the buyer has accepted the goods, the buyer can only go for damages and not rescission. Note: Subsection 12(3) provides that the buyer must go for damages only also when it is a contract for specific goods and the property has passed to the buyer.

Transfer of Title Under the Convention

The *Convention* abstains from adopting any rules on the transfer of title, but rather takes a more functional approach to risk in Articles 67 through 69. Article 4(b) provides a confirmation that the *Convention* is not to be concerned with the effects that the contract might have on the property as sold. Title is not the organizing concept as it is in the *Sale of Goods Act*, nor does it purport to say what happens to title for any outside context, such as bankruptcy and priorities.

Article 4(b) – Convention Not Concerned with Title

> This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
>
> (b) the effect which the contract may have on the property in the goods sold.

Buyer's Obligations and Seller's Remedies

Seller's Remedies Under the Sale of Goods Act

In the SGA we make a distinction between personal remedies and real remedies. The two personal remedies are embodied in Part V of the *Act*, such as price (section 47) and damage/non-acceptance (section 48). The seller's real remedies represent the seller's right to control the goods – the link between the seller and the goods. Section 38 of the Act provides that even though the property in the goods has already passed to the buyer an unpaid seller still has a lien on the goods while the goods are in the seller's possession.

Section 47 – Actions for the Price

> **47.(1)** Where, under a contract of sale, the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against the buyer for the price of the goods.
>
> **(2)** Where under a contract of sale the price is payable on a day certain, irrespective of delivery, and the buyer wrongfully neglects or refuses to pay the price, the seller may goods has not passed and the goods have not been appropriated to the contract.

Section 48 – Action for Non-Acceptance

> **48.(1)** Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against the buyer for damages for non-acceptance.
>
> (2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract.
>
> (3) Where there is an available market for the goods in question, the measure of damages is, in the absence of evidence to the contrary, to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Section 38 – Rights of Unpaid Seller

> **38.(1)** Subject to this Act and any statute in that behalf, although the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law,
> (a) a lien on the goods or right to retain them for the price while in possession of them;
> (b) in case of the insolvency of the buyer, a right of stopping the goods in the course of transit after parting with the possession of them;
>
> **(2)** Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to other remedies, a right of withholding delivery similar to and co-extensive with the rights of lien and stoppage in the course of transit where the property has passed to the buyer.

Actions for the Price

Colley v. Overseas Exporters (1921) Eng KB

Facts	Holding	Ratio
○ The seller followed the buyer's instructions and sent the goods f.o.b. Liverpool and even paid the shipping agent the buyer had nominated – it appears the seller has done everything it could do ○ The goods remained in Liverpool and the price remained unpaid	○ *Issue*: Did property pass? ○ In order to claim for the price, property must pass ○ Property in an f.o.b. contract passes when it gets across the rail ○ The property had yet to get across the rail ○ The property did not pass and, therefore, the seller could not sue for the price – the buyer would owe damages if the seller could come forward with such evidence	○ A seller cannot claim for the price of the contract unless property/title passes to the buyer ○ Section 47 requires the passing of title before it can be applied

Recall that the courts have taken a fairly strict approach to title/property – property does not pass until the last act necessary for the transfer of title has actually occurred.

Stein Forbes and Co. v. County Tailoring Co. (1916)

Facts	Holding	Ratio
○ The transaction was c.i.f. – covering all the charges until the post of destination ○ Payment for sheepskins was supposed to be in cash against the arrival of the steamer ○ The buyer refuses to take the documents and the seller tries to sue for the price ○ Seller argues under 47(2) – day certain ○ Seller argues that property had passed	○ 47(2) is not applicable because the day certain must be a specified date ahead of time and not the date that something happens ○ This is a documentary transaction and, therefore, property passes only when those documents are accepted and exchanged for payment	○ Property is only intended to pass in a documentary sale when the documents are handed over as against payment ○ In a day-certain transaction, the date must be specified

In a documentary transaction, we know that the seller typically hands over a bill of lading for payment. The discussion of a site-draft or time-draft has to do with the method of payment. For instance, the site-draft requires the payment to pay on site when the documents arrive. A time-draft refers to an arrangement between the parties that the buyer gets a little bit of credit – s/he might be required to pay within 30 or 60 days. The buyer pays against those documents and does not inspect the goods until after it has paid – there is a right to review and reject the documents, but this still turns over to a question of the inspection and rejection of the goods.

With a documentary transaction we should not say that the seller is reserving the property, but only a part of the property. In essence, creating a security interest in the property. A documentary sale means that the property generally goes along with the transfer of the documents in exchange for the price. The criticism is that this is fairly tough for the seller.

Section 46 – Right of Resale

> **46.(3)** Where the goods are of a perishable nature or where the unpaid seller gives notice to the buyer of intention to resell and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by a breach of contract.

R. V. Ward Ltd. v. Bignall (1967) Eng CA

Facts	Holding	Ratio
○ There was a contract for the sale of two cars ○ Buyer puts down $25 and arranges a payment scheme ○ Buyer changes his mind on the sale and wants only one car – the seller did not want to sell just one ○ Buyer refuses to pay on the contract ○ Seller notified the buyer that he would re-sell the goods should the buyer refuse to pay	○ Whether we consider the property having been passed or whether we characterize it as the property as not having been passed, an action for the price is not available here ○ This is a rescission of the contract – even though 46(3) does not say so, when exercising a right of resale you must be rescinding the contract	○ The unpaid seller has a right to resell the goods if he gives notice of his intention to do so and the buyer does not within a reasonable time pay or tender the price

Where the unpaid seller gives notice to the buyer about intention of resale, and the buyer does not pay within a reasonable time, an unpaid seller may sell the goods and recover damages from the buyer. When you look at 46(1) and 46(2), the same reasoning that applies in *Bignall* will apply for these two subsections.

Seller's Remedies Under the Convention

Title is not dealt with in the *Convention*. The *Convention* is not worried about title to the goods or who gives good title to an outside third party etc., for the purposes of the convention those are all matters that will be dealt with the underlying law. Rather, the significant remedies depend on a fundamental breach or the declaration of an avoided contract. From the seller's perspective s/he may declare the contract avoided if the buyer's failure to perform its obligation amounts to a fundamental breach.

Article 64(1)(a) – Avoided Contract by Seller

(1) The seller may declare the contract avoided:
(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract

The seller, according to Article 61, can exercise the rights that have to do with price (62-65) and can also claim damages (74-77) if the buyer fails to perform. The seller is not deprived of any right to claim damages by exercising any other remedies.

Article 61 – Seller's Remedies Where Buyer Fails to Perform

(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:
(a) exercise the rights provided in articles 62 to 65;
(b) claim damages as provided in articles 74 to 77.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

There is a lien expressed at Article 58(2) relating to the control of the disposition of the goods as against payment of the price.

Article 58(2) – Lien Rights

> (2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

Under the *Convention*, the general concept is that of fundamental breach. The seller, in the case of a fundamental breach, is able to declare the contract avoided. The concept of 'avoided' is similar to our notion of rescission (Article 81). Avoidance releases the parties from the obligations under the contract subject to an obligation to pay damages.

The seller has a full set of remedies under the *Convention.* For instance, the seller may require the buyer to pay the price (Article 62). Also, the seller has the opportunity to take any of the buyer's breaches and turn them into grounds for avoidance of the contract even if they were not fundamental to start with (Article 63). The seller can declare the contract avoided for a fundamental breach on the buyer's side (Article 64).

Article 62 – Action for the Price

> The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

Article 63 – Avoidance of the Contract

> (1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.
>
> (2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 64 – Avoidance Due to Fundamental Breach

> (1) The seller may declare the contract avoided:
> (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
> (b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.
> (2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:
> (a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or
> (b) in respect of any breach other than late performance by the buyer, within a reasonable time:
> (i) after the seller knew or ought to have known of the breach; or
> (ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) or article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

The main approach in Article 62 reflects the general approach to remedies from the civil law system – this is not a common law approach. When the negotiators were putting the two systems together, they really had a great deal of obstacles to overcome. The compromise that was negotiated is reflected in Article 28 of the *Convention*.

Article 28 – Specific Performance Assessed by Jurisdiction

> If in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention

Because the notion of specific performance is so tricky, the negotiators decided to leave the determination to the law of each particular jurisdiction. In the negotiating record, it is clear that this particular Article is intended to apply both to the seller's remedy for the price and the buyer's remedy for the goods. This Article is intended to preserve what seems to be significant public policy in the common law of limiting specific performance and favoring damages. The extent of the override is not clear – some of the commentary suggests that a common law court could go back to its own tests. The *Convention* does intend to make is easier for the seller to demand the price – the seller is to have the full range of remedies and ought to be deprived of the right to one only if it is inconsistent with another.

The system for remedies in the *Convention* is significantly different from ours. It does not depend on conditions or warranties, but rather on the notion of fundamental breach. It is intended to provide the innocent party with a range of remedies.

Buyer's Remedies and Seller's Obligations

Buyer's Remedies Under the Sale of Goods Act

The type of remedy available depends largely upon the condition and warranty distinction. The buyer's right of rejection is limited to cases where there is a breach of a condition – a mere breach of warranty is not enough.

Subsection 12(3) – When a Condition is Treated as a Warranty

> **12.(3)** Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

Home Gas v. Streeter (1953) Sask. CA

Facts	Holding	Ratio
o A stove was purchased and installed o The buyer's husband had seen the stove in a trailer o There were problems with the stove all along o The buyer kept trying to contact the seller – the seller was not able to fix it satisfactorily o The buyer refused to pay and, therefore, was sued by the seller	o The court holds that the buyer has to pay the price o The buyer never actually rejected the goods – the claim should be for damages as opposed to avoidance of the price o The buyer was in trouble under section 12(3) o When the buyer has accepted the goods, the breach of any condition can only be considered a breach of warranty and only compensable in damages o Because the goods here are specific goods, section 19 also tells us that in the case of specific goods property/title passes to the buyer at the time of the formation of the contract	o In a contract of sale where the buyer has accepted the goods, a breach of condition can only be interpreted as a breach of warranty

Sections 33 and 34 of the *Sale of Goods Act* provide the rights of a buyer as to examination and provisions relating to the acceptance of goods. Section 33 is the buyer's right to examine the goods while section 34 is the deemed acceptance provision – if the buyer keeps the goods without intimating that they have been rejected, that will be deemed to be acceptance. How long can the buyer keep the goods – trying out period? The burden is placed particularly high on the seller, which lends support to the proposition that the *Sale of Goods Act* favors the buyer's rights over that of the merchant.

Section 33 – Buyer's Right to Examine

> **33.(1)** Where goods are delivered to the buyer that the buyer has not previously examined, the buyer shall be deemed not to have accepted them until there has been a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.
>
> **(2)** Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, the seller shall, on request, afford the buyer a reasonable opportunity of examining the conformity with the contract.

Section 34 – Deemed Acceptance of Goods

34. The buyer shall be deemed to have accepted the goods when the buyer,

(a) intimates to the seller that the goods have been accepted;
(b) after delivery, does any act in relation to them that is inconsistent with the ownership of the seller; or
(c) after the lapse of a reasonable period of time, retains the goods without intimating to the seller that they have been rejected.

Hardy & Co. v. Hillerns and Fowler (1923) Eng CA

Facts	Holding	Ratio
○ A large shipment of wheat is c.i.f. from Uruguay to England ○ The buyer's bank has already paid for the documents ○ The buyer unloads the ship and resells parts of the shipment to sub-buyers ○ The buyer takes one sample, tests it, finds a problem, and two days later declares that it rejects the shipment due to poor quality ○ Arbitration board held that the buyer did this in a reasonable time ○ Seller argues the buyer no longer has the right of rejection	○ *Issue*: How do the buyer's right to examine the goods fit in with assumptions about how a documentary transaction works ○ The buyer has committed, after delivery, an act inconsistent with the seller's ownership [34(b)] ○ The buyer has already sent the wheat to a distant place and transferred possession to other parties – this does not give the seller enough time to deal with the property in a timely fashion ○ The buyer cannot undertake an act inconsistent with the seller's ownership and reject	○ When you part with possession you have done something that is inconsistent with the ownership of the seller ○ When the buyer rejects, the seller is entitled to have the goods at his/her own disposal right away (possession appears to be key) ○ Any act inconsistent with the rights of the seller will be deemed acceptance of the goods

Rafuse Motors v. Mardo Construction (1963) NS CA

Facts	Holding	Ratio
○ The buyer had kept a tractor for some time and used it – every time he tried to use it there was a problem – could not be fixed ○ The buyer refused to pay on his promissory note ○ Seller argued that after a lapse of a reasonable time the buyer is deemed to have accepted the goods	○ *Issue*: Could the buyer refuse payment or reject? ○ The buyer was still within a reasonable time, in particular because the seller was making constant efforts to fix the goods ○ The buyer should not be penalized for being reasonable and trying to work things out	○ So long as the buyer is within a reasonable trying out time for the goods, the buyer should have the reasonable opportunity to examine them

Hart-Parr Company v. Jones (1917) Sask SC

Facts	Holding	Ratio
○ The seller was supposed to sell a new motor and sold a reconditioned used motor instead – it had been repainted so that you could not tell ○ The buyer kept the motor for over 8 months	○ Even though the buyer had kept it for quite a long period of time, this is within the trying out period – the extended period of time can be explained because of the intervening winter period – the paint peeled after winter	○ Where there is a 'secret defect', not discoverable by any reasonable exercise of care or skill, the buyer will likely be able to reject once the defect comes to light

The crucial question for the buyer's remedies is not the passing of property, but rather acceptance of the goods (with the qualification of specific goods and title passing). The strongest remedy the buyer usually wants is the right to reject the goods.

Instalment Contracts

Section 30 – Delivery by Instalment

> **30.(1)** Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.
>
> **(2)** Where there is a contract for the sale of goods to be delivered by stated instalments that are to be separately paid for and the seller makes defective deliveries in respect of one or more instalments or fails to deliver one or more instalments or the buyer neglects or refuses to take delivery of or pay for one or more instalments, **it is a question in each case** the case **whether the breach** of contract **is a repudiation of the whole contract or whether it is a severable breach** giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated

Maple Flock v. Universal Furniture (1934) Eng CA

Facts	Holding	Ratio
○ The seller is delivering flock to a manufacturer of furniture and bedding under a long-term contract for 100 tones ○ Each installment is supposed to be 1 ½ tones ○ Because of a government regulation relating to quality of flock, there is a requirement that the goods delivered have to meet the government standard of no more than 3ppm of chlorine ○ At delivery 16 – buyer tests and finds that there are 25ppm ○ The buyer is trying to cancel the entire contract b/c of this one installment	○ The buyer has to go through the rest of the contract and is not permitted to reject the rest ○ Section 30(2) provides that it is a question in each case, depending on the contract and circumstance, as to whether this is a breach of the entire contract or a severable breach ○ It is a question of the quantitative relationship between the installment and the entire contract ○ Also, look to the degree of the probability of a repeat of the problem – it is unlikely	○ If the breach is severable from the whole contract, then it should be severed and the rest of the contract maintained ○ The buyer can get out of an installment contract only if the breach is significant enough to affect the entire contract

From the buyer's perspective we must consider:

1. Breach of the condition;
2. Whether the buyer has rejected or accepted the goods; and,
3. Whether the breach severable from the rest of the contract?

Specific Performance

Section 50 – Specific Performance

> **50**. In an action for breach of contract to deliver specific or ascertained goods, the court may, if it thinks fit, direct that the contract be performed specifically, without giving the defendant the option of retaining the goods on payment of damages, and may impose such terms and conditions as to damages, payment of the price, and otherwise, as to the court seems just.

Section 50 of the *Sale of Goods Act* provides that the court may direct that the contract is performed specifically and may impose terms and conditions and change the price etc., but this applies only in the breach of a contract for specific or ascertained goods. Thus, specific performance is limited to cases where the goods are specific or ascertained.

In Re Wait (1927) Eng CA

Facts	Holding
○ A buyer who is awaiting the delivery of wheat has already paid and made a sale of the wheat ○ The buyer learns that his vendor is about to go bankrupt and a receiver has been appointed ○ Buyer brings an action for specific performance of the contract	○ Specific performance is only available for ascertained goods ○ The buyer purchased wheat, not any particular wheat ○ The beneficial interest in goods does not pass to the purchaser until they have become identifiable goods ○ The goods can only pass when goods in a deliverable state are appropriated to the contract

Sky Petroleum v. VIP Petroleum (1926) Eng CA

Facts	Holding	Ratio
○ A contract for the supply of gasoline and diesel fuel – the market price had gone way up ○ This was a very unusual case because of the nature of the inflated prices ○ There is no available alternate supplier for the plaintiff	○ The seller was ordered to continue to supply under the prices of the contract ○ The goods were not ascertained ○ The court has the discretion to order specific performance on an interlocutory matter ○ Because of the hardship that would otherwise be imposed upon the plaintiff, the court applies its discretion in ordering specific performance	○ Section 50 describes the situation in current sales law that you are not going to get specific performance unless the goods are specific or ascertained ○ This case is the anomaly

Seller's Opportunity to Redeem Under the Convention

The starting point might be Article 37, 38, 39 and 40. There is a little more here about the buyer's examination of the goods as opposed to the *Sale of Goods Act*. Also, the seller gets a little bit of leeway up until the official time of delivery – so long unreasonable inconvenience to the buyer is not caused.

Article 37 – Seller's Opportunity for Redemption Before Delivery

> If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Article 38 – Examination of Goods

> (1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.
> (2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.
> (3) If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new destination.

Article 39 – Notice of Lack of Conformity

> (1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.
> (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

Article 40 – Exceptions to 38 & 39 Where Seller Knows

> The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Article 38 requires that the buyer examine the goods within as short a period of time as is practicable in the circumstances. If the buyer does not give notice of a problem, the buyer may lose the right to complain about the problem. In any event, there is a limitation period of two years from the time that the goods were handed over.

Buyer's Remedies Under the Convention

Article 45 provides that the buyer may exercise certain rights, which are based on the same provisions that the seller would use. The buyer's particular remedies are at Articles 46 through 52.

Article 45 – Buyer's Remedies Where Seller Fails to Perform

> (1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:
> (a) exercise the rights provided in articles 46 to 52;
> (b) claim damages as provided in articles 74 to 77.
> (2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

If the goods do not conform to the contract, the buyer may require delivery of substitute goods if the lack of conformity is a fundamental breach. The buyer also has the right to demand a cure.

Article 46 – Performance, Curing and Substitute Goods

> (1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.
> (2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.
> (3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

The *Convention* adopts an approach to try and keep the bargain going and allow the parties to negotiate out of the problem. The parties should work things out – the buyer has the right to demand substitute

goods, cure (article 46), the seller has the right to cure subject to some the qualifications that it will not cause unreasonable inconvenience or delay (article 48).

Article 48 sets outs a schedule of notices between the parties. Note, article 48 is subject to article 49 – the buyer's basic right to declare the contract avoided. The buyer is supposed to have the right to declare the contract avoided if the problem amounts to a fundamental breach. If the buyer sets a period of time for cure and the seller does not cure within that time, then the buyer gets to avoid the contract. The difficulty usually lies in trying to figure out how the buyer's choice of remedy fits with the seller's right to cure.

Article 48 – Curing Option and Notices

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.
(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.
(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.
(4) A request or notice by the seller under paragraph (2) or (3) of this Article is not effective unless received by the buyer.

Leaving avoidance entirely to the buyer means that the seller would not really have anything under Article 48 and an option to cure. In order to make the right to cure effective, we have to say that if the buyer has not exercised rights under 49, then the seller has the option to cure.

Article 49 – Avoidance of the Contract

(1) The buyer may declare the contract avoided:
  (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
  (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.
(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:
  (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;
  (b) in respect of any breach other than late delivery, within a reasonable time:
    (i) after he knew or ought to have known of the breach;
    (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or
    (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

Remember, under the *Convention* the question is not one of warranties or conditions, but rather one of whether or not there had been a fundamental breach. Fundamental breach is the trigger for the right to avoid the contract. When the contract is avoided the effects are similar to our common law rescission of the contract: it releases both parties from the conditions of the contract subject to damages.

Article 50 – Right to Reduce Price

> If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those Articles, the buyer may not reduce the price.

Compare articles 81 and 82 of the *Convention* with the *Sale of Goods Act*. Article 81 describes the general effects of avoidance while 82 provides a limit on the buyer's right to avoid the contract.

Article 81 – Effects of Avoidance

> (1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.
>
> (2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Article 82 – Loss of Right to Declare Contract Avoided

> (1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.
> (2) The preceding paragraph does not apply:
> (a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;
> (b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or
> (c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course normal use before he discovered or ought to have discovered the lack of conformity.

In the *Sale of Goods Act* you decide whether there has been a breach of a condition or a warranty and then the mechanism is either keep or reject (a one time decision). The idea in the *Convention* is to encourage the parties to negotiate their way out of a problem and see if the deal can be saved.

All of the buyer's demands are subject to Article 28, which provides that if a party requires performance the laws of the jurisdiction from which that party resides will apply. Thus, the common law court does not have to order specific performance.

Therefore, if the common law court in Ontario is faced with the question, the Ontario court may rely on section 50 of the *Sale of Goods Act* in support of specific performance opposed to any Article in the *Convention*.

General Refractories of Canada v. Ventrodyne Ltd. (2002) ON SCJ

Facts	Holding
o A sale between Illinois and Ontario (Chicago to Smithville) for a very large press used for the creation of refractory brick o The deal was negotiated in New York o The press was delivered and set up in the Spring and into the Summer of 1982 – it never really worked very well o The seller did its best to support the machine – lots of after sale service, but to no avail o In 1984 the buyer gave up on the press and demands their money back o The contract was effected before the effective date of the *Convention's* application	o The choice of law tool in Ontario is to look to the system with the most real and substantial connection – court does not do this o There were choice of law provisions – when the buyer sent the order in that was where the contract was effected and that is the choice of law clause to be used (the buyer's place of business) o The court went through the law of both jurisdictions and concludes it would be the same result under both o The buyer was aware of the one year warranty and contacted the seller because the machine was still not working and demanded an extension of the warranty o The court found that the three specific guarantees continued to last o A fitness for purpose argument was also raised o The fitness for purpose obligation was read in because under the provincial legislation this is a condition (note: the exclusions in Illinois were for warranties, not conditions!). Therefore, the seller is still hit with the condition of fitness for purpose o If the three guarantees were not going to be honored, then the court would read in the implied condition from the statute relating to fitness for purpose

Would it have helped in the *Convention* had applied? No, the machine never worked and we would have a fundamental breach.

Payment and Negotiable Instruments

Letters of Credit

A letter of credit is an engagement by one party (the issuer who is normally a bank) made at the request of another party (the applicant who is normally the bank's customer) requiring the issuer to honor drafts or other demands for payment in compliance with the conditions specified by the letter. The letter of credit has traditionally been used in international sales of goods. A letter of credit so used is a promise by the issuer directly to the seller, made at the request of the buyer, to pay the purchase of the goods to the seller, or to accept a draft drawn by the seller for an equivalent amount.

Letters of credit may be revocable or irrevocable. The issuer without notice may cancel a revocable letter. Cancellation, however, does not affect the rights already acquired by reliance, payment or acceptance prior to cancellation. An irrevocable letter commits the issuer to honour the credit, notwithstanding any contrary instruction by the applicant.

In connection with commercial credit, a letter of credit, when issued and subsequently accepted by a seller, operates as a conditional payment of the price – not an absolute payment. If the bank does not honor the letter of credit when the documents are presented to it, the seller has a claim in damages against both the issuer and the applicant.

With respect to the beneficiary, the issuance of the documentary credit generally binds the issuer and confirmation binds the confirming bank as soon as the credit is communicated to the beneficiary.

Terms/Vocabulary

Applicant – the customer to whom the bank issues the letter of credit

Beneficiary – the person to whom the credit is issued for

Bank – when a sales contract between a buyer and a seller provides for payment by way of documentary credit, banks may act on behalf of the parties in the following capacity:

1. *Issuing Bank* – Bank that opens credit in accordance with the instructions of a customer and is usually the customer/importer's own bank. Credits must clearly indicate whether they are available by sight payment, deferred payment, acceptance, or negotiation;
2. *Advising Bank* – The bank that receives notification from an issuing bank that credit is open and subsequently advises the beneficiary of the details. Unless it has added its confirmation to the credit, the advising bank has no obligations to the beneficiary to pay, accept, or negotiate drawings. The advising bank is required to take reasonable care in checking the apparent authority of the credit that it advises;
3. *Confirming Bank* – When an advising bank is requested to add its confirmation to a credit, such confirmation constitutes a definite undertaking of the advising bank, additional to the undertaking of the issuing bank, that provided the stipulated documents are presented and that the terms and conditions of the credit are complied with, payment, acceptance, or negotiation will be effected;
4. *Paying/Accepting Bank* – Bank designated to pay or accept drafts drawn under the credit. It is generally the issuing or the advising bank, but in certain cases it may be a third bank in a large financial center;
5. *Negotiating Bank* – When the paying or accepting bank on which drafts are to be drawn is located, for instance in another country to that of the beneficiary, the credit will usually allow the

beneficiary to negotiate drawings under the credit at a particular bank in the beneficiary's country or alternatively the credit may freely negotiate with any bank

Acceptance – In accepting the draft the bank signifies its commitment to pay the face value at maturity to a *bona fide* holder presenting it for payment at the appropriate time

Deferred Payment – When the payment/reimbursement instruction of credit does not include the presentation of a draft, but includes a maturity date in the wording of the credit, this is referred to a deferred payment credit

Bank of Nova Scotia v. Angelica Whitewear (1987) SCC

Facts	Holding
○ The defendant is the customer of the plaintiff bank ○ Through the bank the defendant opened a letter of credit including an undertaking by the bank to honour drafts presented with conforming documents ○ Before one draft was paid by the plaintiff, the defendant advised it of certain alleged discrepancies on the face of the documents accompanying the drafts ○ The bank paid the draft anyway ○ Following payment of a second draft the defendant advised the bank of a forged signature on the documentation ○ The defendant contends that the bank was not entitled to debit its account because of the notice and because the documents were not conforming ○ The bank instituted an action against Whitewear and Angelica Corp. for the balance owing one a promissory note representing Whitewear's indebtedness	○ The fundamental principle governing documentary letters of credit and the characteristics that give them their international commercial utility is the obligation of the issuing bank to honour a draft on a credit accompanied by documents appearing on their face to be in accordance with the terms and conditions of the credit, which is independent of performance of the underlying contract for which the credit is issued ○ Disputes between the parties to the underlying contract do not justify refusal by an issuing bank to honour a draft that is accompanied by conforming documents ○ There is an exception in the case of fraud: in the case of fraud by a beneficiary that has been sufficiently brought to the bank's attention prior to the payment, the bank is not obliged to honour a draft accompanied by apparently conforming documents ○ Fraud may be extended to the underlying transaction insofar as a demand for payment under a fraudulent transaction is a fraudulent demand ○ The fraud exception extends to any act of the beneficiary that would permit the beneficiary to obtain the benefit of the credit as a result of fraud ○ The fraud exception, however, does not extend to fraud committed by a third party ○ Moreover, the fraud exception cannot extend to the holder in due course of a draft on a letter of credit ○ There is no evidence in this case that the plaintiff paid the drafts improperly – There was, however, inconsistency in the accompanying documents so that one of the drafts was improperly honoured by the plaintiff and it is, therefore, liable to the defendant for that ○ **Test**: Whether the fraud was so established to the knowledge of the issuing bank before payment of the draft as to make the fraud clear and obvious to the bank

The two key concepts to keep in mind are 'transferability' and 'negotiability'. Transferability meant that the bill of lading represented the goods as an instrument of title and just transferring the bill of lading could transfer title in the goods. Also, the right to take possession of the goods can be assigned without having to give notice to the bailee. Negotiability, on the other hand, refers to the capacity of this instrument to pass to the buyer or the recipient a better title than the seller had. The purchaser of a negotiable instrument can actually get a better title than the original seller of the instrument had. This is a situation where the innocent third-party purchaser for value, without notice of some difficulty or fraud, can take the instrument free and clear from the fraud – even if the seller of the instrument knew about the fraud or was involved in the title defect.

Negotiable Instruments

A negotiable instrument is a type of document of title embodying rights to the payment of money, which by custom or legislation, is:

1. Transferable by delivery in such a way that the holder may sue on it in his own name and in his own right; and,
2. A bona fide transferee (for value) may acquire a good and complete title to the document and the rights embodied therein, notwithstanding that his predecessor has a defective title or no title at all

To be negotiable, an instrument must be transferred to any person holding it, so as by delivery thereof to give a good title to any person honestly acquiring it. A bill of exchange is an order to pay money drawn by a drawee on a drawer either to the order of the payee or to the bearer. A bill of exchange is often called a draft. A cheque is a particular type of bill. A promissory note is a promise to pay money made by a maker either to the order of the payee or bearer.

Bills of Exchange

Suppose D wants to pay A 50 dollars – D wants to get A a piece of paper to present to B so that A can get the money from B. Thus, A is the payee and B is the drawee. D has an account with C and purchases the order from C for 53 dollars, so when presented with the instrument C orders B to pay A 50 dollars. C is the drawer. The drawer draws an account from the drawee ordering the drawee to pay the payee. This is the standard form of a bill of exchange.

Cheques

What would we need to turn this into a cheque? The *Bills of Exchange Act* defines 'cheque' as 'a bill drawn on a bank, payable on demand'. A cheque, therefore, must be made payable on demand.

Promissory Notes

A promissory note is slightly different. The promissory note is simply a promise to pay. X promises to pay the payee 50 dollars (it only has two parties). The *Bills of Exchange Act* defines 'promissory note' as 'an unconditional promise in writing made by one person to another person, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer'.

What is meant by the term 'after sight'? For instance, in a bill of exchange identified with a '3 months after sight' tag line requires a period of three months before any expectation of payment.

With the notion of negotiability, an individual receiving a note to be paid at a later date, may sell the note to a third party at a reduced rate in exchange for earlier receipt. If the last named endorsee has endorsed the cheque, the cheque will be payable to the bearer.

Bills of Exchange

Section 16 describes the basic rules for all bills of exchange. Starting in Part III at section 164 are the specific provisions dealing with cheques. In Part IV starting at section 176 are the provisions dealing with notes. Notes adopt most of the principles of negotiability, but these are two party instruments. Part V is of more recent vintage and deals with consumer bills and notes. This Part sets out instances where it might not be fair that the financing function is isolated from the actual transaction. This sets out the

requirements for consumer bills and notes. Where you don't want this document to wind up in the hands of a holder in due course who can hold it against the consume – this is an exception to negotiability.

The bill of exchange is a three-party negotiable instrument in which the drawer orders the drawee to pay to the payee. This only works where the drawer has the liquidity to draw funds from some account in its control. This bill of exchange qualifies as a cheque if it is payable upon demand and drawn on a bank. A promissory note is a two-party negotiable instrument where the payor of the note promises to pay to the payee. Generally speaking, Part II of the *Bill of Exchange Act* provides the major provisions relating to cheques and promissory notes.

Since these are negotiable instruments they can be negotiated prior to the time when they come due. The typical endorsement entails a signature by the payee on the back of the instrument. The payee, when s/he signs on the instrument, endorses the instrument. The same holds true for promissory notes.

BEA Subsection 16(1) – Bill of Exchange

> **16.(1)** A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or on a fixed future determinable time, a sum certain in money to or to the order of a specified person or to bearer

The characteristic of negotiability is the characteristic that allows for an endorsement over so that new parties may take the benefit of the instrument. The potential winner of the endorsement is the holder of the instrument in due course. There are a number of ways in which a payment mechanism can be established between the immediate parties. The question is whether or not these mechanisms are acceptable in the definition of bill of exchange and the rights and obligations of subsequent parties.

Thus, a determination of compliance with the 16(1) provision really turns upon the characteristic of negotiability. Whether an instrument meets the requirements set out under the *Act* depends upon the element of negotiability.

Consider the three-party system where the drawer draws on the drawee to pay to the payee. What if the drawer and the payee are the same person?

BEA Subsection 18(1) – Bill payable to Drawer or Drawee

> **18.(1)** A bill may be drawn payable to, or to the order of, the drawer, or it may be drawn payable to, or to the order of, the drawee.

This is still acceptable as a bill of exchange by virtue of the provision. Suppose the drawee and the payee are the same person, is this acceptable? The same provision applies. Can the drawer and the drawee be the same person?

BEA Section 25 – Bill or Note

> **25.** Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill or as a note

Section 25 refers to the holder of the note – the holder means "the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof." A bearer means "the person in possession of a bill or note that is payable to bearer".

Requirements on a 'Bill of Exchange'

The bill of exchange must be an unconditional order in writing – it cannot be expressed to be payable upon a contingency.

BEA Subsection 17(1) – Instrument Payable on Contingency Not Bill

> **17.(1)** An instrument expressed to be payable on a contingency is not a bill and the happening of the event does not cure the defect

Section 41 covers bills payable at site, 30 days after site, etc., so long as it is not payable on demand three days of grace will be added. The days of grace do not count legal holidays. A fixed and/or determinable future time is not intended to add a contingency. The determinability does not add anymore acceptance of contingency – it still has to be certain to happen for section 16 to apply.

BEA Section 41 – Computation of Time

> **41.** Where a bill is not payable on demand, three days, called days of grace, are in every case, where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace, but whenever the last day of grace falls on a legal holiday or non-juridical day in the province where any such bill is payable, the day next following, not being a legal holiday or non-juridical day in that province, is the last day of grace

If there is no stipulation relating to some determinable time, then the bill is payable upon demand.

BEA Paragraph 22(1)(b) – Payable on Demand Where no Time Specified

> **22. (1)** A bill is payable on demand
> **(b)** in which no time for payment is expressed.

Bills may be payable either to order or to the bearer – subsection 20(2). Where a bill is not payable to the bearer, then a specific name must be indicated – subsection 20(4)

BEA Section 20 – Transfer according to Words

> **20.(1)** When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but it is not negotiable.
>
> **(2)** A negotiable bill may be payable either to order or to bearer.
>
> **(3)** A bill is payable to bearer that is expressed to be so payable, or on which the only or last endorsement is an endorsement in blank.
>
> **(4)** Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.
>
> **(5)** Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.

BEA Section 63 – Misspelled Name

> **63.** Where, in a bill payable to order, the payee or endorsee is wrongly designated or his name is misspelt, he may endorse the bill as therein described, adding his proper signature, or he may endorse by his proper signature

CIBC v. Morgan (1993) AB QB

Facts	Holding	Ratio
○ Morgan obtained a bank loan to purchase a car – Germaine agreed to co-sign on the loan ○ A bank plan note was signed for $21,500 ○ Morgan defaulted on the loan, the car was sold and the proceeds applied against the debt ○ The bank sought the balance from Germaine and took money from Germaine's account along with an investment certificate, which was subject of the original contract ○ Germaine claimed that his maximum liability was the investment certificate ○ Germaine also argues that the note was not a promissory note because: (1) it was conditional and (2) was not made out for a sum certain	○ The note contained terms on the bank allowing the bank to vary the note with notice – this makes the note a conditional note ○ The possibility of a contingency arising makes the note conditional ○ This lack of uncertainty precludes the note from being a promissory note ○ The note was also uncertain as to sum because authority was given to extend it beyond the note to another security document – there was also an acceleration clause, which is not in accord with an unconditional promise to pay a sum certain ○ Germain is not liable as a guarantor as he co-signed as a primary borrower	○ A promissory note must be an unconditional promise to pay a sum certain

Section 27 of the *Bills of Exchange Act* provides that a sum cis a sum certain even if it is required to be paid with interest by stated installments with a provision that on default of any installment the whole shall become due.

BEA Subsection 27(1) – Sum Certain

> **27.(1)** The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid
>
> (a) with interest;
> (b) by stated instalments;
> (c) by stated instalments, with a provision that on default in payment of any instalment the whole shall become due; or
> (d) according to an indicated rate of exchange or a rate of exchange to be ascertained as directed by the bill.

Liability on a Bill of Exchange

Power to Enforce

A bill is both a chattel and a chose in action. It involves ownership not only in terms of possession, but in the right to sue several other persons, such as the drawer or acceptor. The instrument is a chattel governed by general property law as well as the obligations of contract law. More specifically, as a negotiable instrument the paper is governed by the special laws of merchant, which are codified in the *Bills of Exchange Act*. The starting point is the 'Holder'.

BEA Section 2 – "Holder"

> "holder" means the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof

The person with the power to enforce on the bill of exchange is the 'holder'.

BEA Subsection 73(a) – Power of Holder

> **73.** The rights and powers of the holder of a bill are as follows:
> (a) he may sue on the bill in his own name

General Liability

Suppose the time comes for the bill to be payable and the drawee does not pay it – who is liable for it? You could be liable on a bill of exchange if you are the drawer or endorser, but you could also be liable if you are the acceptor. In the promissory note situation, the maker of the promissory note and any endorser may be liable for the note. This scheme is embodied in the statutory regime. Section 127 provides where an acceptor will be liable. Section 129(a) deems a drawer of the bill as liable – the drawer will compensate the holder or any endorser that is compelled to pay.

BEA Section 127 – Liability of Acceptor

> **127.** The acceptor of a bill by accepting it engages that he will pay it according to the tenor of his acceptance

BEA Subsection 129(a) – Liability of Drawer

> **129.** The drawer of a bill by drawing it,
> (a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonored he will compensate the holder or any endorser who is compelled to pay it, if the requisite proceedings on dishonor are duly taken

BEA Subsection 132(a) – Liability of Endorser

> **132.** The endorser of a bill by endorsing it, subject to the effect of any express stipulation authorized by this Act,
> (a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonored he will compensate the holder or a subsequent endorser who is compelled to pay, if the requisite proceedings on dishonor are duly taken

You are not liable unless you have signed – it is the signature on the bill that makes you liable. The signature is the number one factor. There will be no liability as an acceptor, drawer, or endorser unless there is a signature.

BEA Section 130 – Liability Only When Signed

> **130**. No person is liable as drawer, endorser or acceptor of a bill who has not signed it as such, but when a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liabilities of an endorser to a holder in due course and is subject to all the provisions of this Act respecting endorsers.

Preserving Liability

Those liable on the instrument are either 'primary' or 'secondary' parties. Primary parties are those liable to pay according to the tenor of their undertaking. These are acceptors of the bill and makes of the note. Secondary parties engage only to pay on the dishonour of the instrument. They are the drawer of a bill and the endorser of a bill or note. The holder of the bill does not need to do anything special in order to fix liability on a primary party. However, there are various formalities that must be observed in order to preserve rights as against secondary parties. Delay in carrying out these requirements will result in a discharge of liability.

BEA Section 74 – Presentment for Acceptance

> **74.(1)** Where a bill is payable at sight or after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument.
>
> **(2)** Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment.
>
> **(3)** In no other case is presentment for acceptance necessary in order to render liable any party to the bill.

BEA Section 91 – Presentment for Payment

> **91.(1)** Presentment of a bill for payment is dispensed with:
>
> (a) where, after the exercise of reasonable diligence, presentment, as required by this Act, cannot be effected;
> (b) where the drawee is a fictitious person;
> (c) with respect to the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented; or
> (d) with respect to an endorser, where the bill was accepted or made for the accommodation of that endorser, and he has no reason to expect that the bill would be paid if presented;
> (e) by waiver of presentment, express or implied.

Note: An instrument that is to be paid at a fixed or future time must be presented for payment on the day that it falls due (s.41). Also, the instrument must generally be presented within a reasonable time after its issued. Delay, however, will be excused where it is beyond the control of the holder.

BEA Subsection 95(1) – Notice of Dishonor and Protest

Dishonor occurs where an instrument is presented for acceptance or payment and the acceptance or payment is refused or cannot be obtained. In such a case, the holder must give a notice of dishonour to the drawer of the bill and each endorser of the bill.

> **95.(1)** Subject to this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each endorser, and any drawer or endorser to whom the notice is not given is discharged.

The notice may be either verbal or written (section 101). The provisions dealing generally with the notice of dishonour are located at section 95 through 107.

Holder in Due Course

Who gets to benefit from this chain of liability? The 'holder in due course'. The holder in due course is a holder, the payee or endorsee in possession or the bearer, who meets the requirement of section 55(1):

1. S/he must be a 'holder' of a bill as defined in section 2;
2. The bill must be complete and regular on the face of it;
3. Must have become the holder before the instrument was overdue;
4. The holder cannot have had notice that the bill was previously dishonored;
5. The instrument must have been taken in good faith;
6. The instrument must have been taken for value;
7. The instrument must have been negotiated; and
8. There cannot have been any notice of a defective title

This is the historic bona fide purchaser for value of the common law system. A holder who meets these requirements shall be deemed a holder in due course.

BEA Subsection 55(1) – Holder in Due Course

> **55.(1)** A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely,
>
> (a) that he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact; and
> (b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

BEA Subsection 73(b) – Rights and Powers of Holder in Due Course

> **73.** The rights and powers of the holder of a bill are as follows:
>
> (b) where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill

Thus, the endorsee would be outside any direct contract relationship between the payee and the drawer. That outside party is not going to be affected by personal defences available as between the payee and the

drawer. The magic of negotiability allows some holders to take free of problems that would otherwise have affected the property interest of the payee who is negotiating. For instance, there are things that we would characterize as defects in the title. Here we are blending property law with what might be called negotiable instruments law. The title of a person who negotiates a bill is defective if he obtains the bill by fraud, duress, force and fear etc,

Holder Not in Due Course

BEA Subsection 55(2) – Where Title Defective

> **55.(2)** In particular, the title of a person who negotiates a bill is defective within the meaning of the Act when he obtained the bill, or the acceptance thereof, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it is breach of faith, or under such circumstance as amount to a fraud

BEA Subsection 69(1) – Overdue Bill

> **69.(1)** Where an overdue bill is negotiated, it can be negotiated only subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than the person from whom he took it had.

BEA Section 71 – Taking with Notice of Dishonour

> **71.** Where a bill that is not overdue has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this section affects the rights of a holder in due course.

This is not an exhaustive list – these are not the only defects in title. This section tells us that these are the particular defects of title we are concerned about.

Real Defences Against Holder in Due Course

There is another category found implicitly within the Act. This category includes the real defences. These are defences that relate to the thing itself – the existence of the negotiable instrument itself. Some of these come from case law and some are listed specifically in the legislation. The most obvious legislative real defence is forgery. If you have not signed, but the signature is instead a forgery, then that is a real defence that beats all holders including the holder in due course. Section 48 provides:

BEA Section 48 - Forgery

> **48.** Subject to this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefore or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against who it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority

The real defences are paramount over the other liability found in the Act. Another defence would be circumstances that make the instrument a nullity. Incapacity of the parties is a real defence – it is as if the

drawer is not legally a participant of the instrument. A material alteration apparent on the face of it undermines the qualifications for being a holder in due course.

BEA Section 144 – Material Alteration

> **144.** Where a bill or an acceptance is materially altered without the assent of all parties liable on the bill, the bill is voided, except as against a party who has himself made, authorized or assented to the alteration and subsequent endorsers

Another real defense would be the discharge of the instrument by payment as set out in section 138:

BEA Section 138 – Discharge by Payment

> A bill is discharged by payment in due course by or on behalf of the drawer or acceptor

Priority of Defenses

The priority of defences on a bill of exchange is as follows:

1. Real Defences – things that affect the nature of the thing itself. These things render the thing as *not* a negotiable instrument (forgery – section 48);
2. Holder in Due Course
3. Defects in Title
4. Remote Holder
5. Mere Personal Defences

The personal defences that are only as between immediate parties are mere personal defences. The defect of title, things that would have an effect on title (fraud, force, fear, or duress etc.,) might have an effect, but the holder in due course may take priority over them.

However, the holder in due course is never protected from real defences – the existence or inexistence of underlying obligations on the instrument. If you have a holder who is not in due course, that party will be subject to a defect in title, if there is one, but should take priority over mere defences as between the two original parties. Any subsequent holder should be subordinate to title defects but superior to personal defects.

BEA Section 56 – Subsequent Holder

> **56.** A holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

Whistler v. Forster (1863) Eng

Facts	Holding	Ratio
○ Bill of exchange obtained by fraud ○ Payee of the bill handed it over to somebody else as part-payment of a debt – not endorsed ○ The other party did not know anything	○ There is a right to require a transferor to endorse an instrument ○ The time at which we measure knowledge and good faith is the time at which the instrument is complete	○ The holder of a bill must obtain endorsement of it before notice of any fraud, otherwise s/he will be considered an

about the fraud o The transferee got the instrument endorsed –at which time the holder learned fraud	o At the time of endorsement the transferee could not qualify as a holder in due course because he had notice of the fraud	assignee of an ordinary chose in action without possibility of acquiring better title

Aldercrest Developments v. Hamilton Co-Axial (1958) ON CA

Facts	Holding
o The transferee of the note held the note unendorsed	o *Issue*: Could the transferee be a 'holder' by being in mere possession? o The transferee of the note never becomes a holder without it being endorsed o The best Aldercrest can be is the assignee of the debt – no status from *BEA* o Aldercrest can get no better title than what the transferor had

BEA Subsection 51(1) – Signing in Representative Capacity

> **51.(1)** Where a person signs a bill as drawer, endorser or acceptor and adds words to his signature indicating that he has signed for or on behalf of a principal, or in a representative character, he is not personally liable thereon, but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

Allprint Co. v. Erwin (1982) ON CA

Facts	Holding
o Plaintiff sued the defendant personally as the purported drawer of three cheques o Defendant argued he signed in a representative capacity o Trial judge concluded the cheques were ambiguous in that on their face the defendant appear liable	o Where there is a signature and one corporate name there is ambiguity – is the signature personally liable or is s/he making the corporation liable? o The issue is whether the cheques were that of the corporation or individual o You can look to outside extraneous evidence if there is ambiguity as to liability o The cheques in issue were those of the corporation

When you sign you are presumed to sign in your own personal capacity. The legislation in section 51 provides that you can sign in a representative capacity and you can add words indicating that you are signing in such a capacity. In a situation where you have a couple of signatures you get the organization plus the personal liability of those who signed. For instance, a company name followed by three signatures is not ambiguous.

A holder of a bill or note who is not paid must give notice of dishonor to certain parties. You do not have to give notice to the acceptor or the maker – these parties have not paid. Notice is being given to the other parties – the drawer or endorsers. This notice must be given relatively quickly. The notice has to be either oral or written the next juridical day. The protest of a foreign bill must be on the date of dishonor.

Remote Holders

Giving value after a bill is overdue will not qualify one as a holder in due course, but there might be some defence as to why the remote holder who is not in due course (but an innocent holder who has given value) should be given priority over the bill. Another party who could be deemed a remote holder is someone who receives the bill as a gift. When you receive something as a gift you step into the shoes of the donor – the giftee cannot defeat any previous interest even without the knowledge element. A person cannot gift more than s/he has.

How do we fit in parties who are not privy to the contract – the remote holder? This person might have taken the instrument after it became due or received the instrument as a gift. More common is the remote holder who has paid for the instrument, but took the instrument too late (past maturity). The standard view is that the remote holder who is not a holder in due course and cannot take priority over defects in title, the remote holder could still take priority over mere personal defences

Article 3 of the Uniform Commercial Code in the United States does not allow for the remote holder who is not a holder in due course to take priority over mere personal defences.

You should distinguish between a liquidated (ascertained) and an unliquidated (unascertained) amount. In a liquidated amount you know how much exactly is owed back. Do any of these things attach to the bill itself? These things are not all in the category of mere personal defences, but some of those things should properly be listed as defects in title and defeat the priority of the remote holder. Both total failure and partial failure of consideration in a liquidated amount, it might be argued, ought to be in the category of defects in title and attach to the note or bill itself. This is an unpopular position. Commonly, even total failure of consideration ought to be considered general contract defences and are in the category of mere personal defences, which can only be asserted against the immediate party. The contract defences are those things that ought to be applied only against the immediate seller.

The distinction is whether the defense is a mere personal defence or a defect in title that attaches to the bill or note. The distinction is important in settling the proper priority listing.

James Lamont v. Hyland (1950) Eng CA

Facts	Holding	Ratio
○ The parties have an contract relating the repair of a ship ○ The conflict centers around when the repairs were to be done ○ As part of the negotiations, the purchaser of the repairs signed as acceptor of the bill of exchange ○ The repairer plaintiff wants to enforce the bill of exchange against the defendant acceptor ○ The defendant argues that there are a number of other contract claims that ought to defeat liability on the bill – damages on breach are much higher than the amount payable on the bill of exchange (set-off)	○ *Issue*: Whether the equitable claim of set-off can be used to block payment on the bill of exchange? ○ This is not good as an equitable set-off – this is not a good defence on a bill of exchange. ○ Even as between immediate parties the bill has the quality of being isolated from an independent transaction ○ The general defence about the breaches are not going to work as an equitable set-off against the amount of the bill ○ There might have been a defence if the goods tendered had not been of the contract description and rejected – there would have been total failure of consideration	○ Total failure of consideration would be a defence on a bill of exchange ○ There is a distinction to be made between total and partial failure of consideration – total failure could be a defence on a bill of exchange as between immediate parties

Iraco v. Staiman Steel (1986) ON CA

Facts	Holding
○ The transaction deals with some purchases of steel – the steel is deficient ○ Purchaser stops payment on the steel	○ *Issue*: Can the purchaser assert as a claim the amounts it says owe from Iraco? ○ This is not a set-off even though there might be some argument in support of its permission in other contexts

○ The seller is trying to assert a 60-day bill of exchange against the buyer	○ The equitable set-off defence is not available on a bill of exchange ○ The court of appeal issued a stay of judgment until the counterclaim is sorted out

These cases support the proposition that the consideration defences, things that are wrong from the underlying contract, ought to be considered defects in title that attach to the bill. Partial failure of consideration even in an unliquidated amount can be prioritized as a defect of title in certain circumstances. The cases used above are all cases as between immediate parties. It is clear that as between immediate parties all of the person defences are good, it is simply a question as o how the procedures mesh.

When we have a situation where the court has said that it will connect the bill of exchange and contract, we can say that it is just a question of convenient procedure between immediate parties. It is probably more of a jump to say that it is something that can be asserted as a defect in title applicable against remote parties in the priority scheme.

The standard view is that all of the contract defences are mere personal defences that cannot be asserted against the bill itself. There is a way to get around some of these problems – if you are able to characterize some deficiency in the contract as fraud, then the deficiency may be elevated as a defect in title, which can be asserted against a remote holder even if the remote holder was completely innocent.

BEA Section 56 – Sheltering

> A holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder

The question will be what happens when you somewhere in the chain a holder in due course and then there are subsequent parties.

The general process for enforcement is that the holder who does not get paid can sue any of the previous holders who, in turn, can always get reimbursement from above. The sheltering provision in section 56 provides that if title is derived through a holder in due course, you can assert all the rights of that holder in due course against all other prior parties.

BEA Section 3 – Standard of Good Faith

> **3.** A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not.

The holder must have taken the bill in good faith and for value without having notice of the defect at the time that the bill was negotiated. Section 3 of the *Bills of Exchange Act* provides the standard for good faith – "a thing is deemed to be done in good faith where it is, in fact, done honestly, whether it is done negligently or not". This is a subjective test – is it really done honestly?

Toronto Dominion Bank v. Canadian Acceptance Corp (1970) PQ CA

Facts	Holding	Ratio
○ A branch manager was said to be 'blundering' and 'careless' in cashing various cheques	○ The honest person cannot be responsible for the underlying fraud relating to an instrument	○ You can be negligent, careless, and blundering and still be a holder in due course – the question will turn

○ The branch manager, however, was honest	○ The honest person is acting in good faith and, thus, the bank can still be the holder of the cheques	on whether you have acted honestly

This case is an illustration of the requirement of a subjective standard for the holder in due course. The question is how do you apply this notion to the idea that if you are presented with facts that should tell you that you need to make inquiries, at what point will you be held to have been willfully blind as to the fact of fraud?

Sales Financing

We have seen how negotiable instruments can isolate the holder in due course from some of the equities of an underlying transaction. Here we are looking at the response of the Canadian Legal System concerning techniques of sales as they developed during the 20th century. More particularly, the idea that the seller would first allow credit to the buyer and then as part as allowing credit to the buyer, would take back both security in the thing sold and, at the same time, take back a negotiable instrument – a promissory note covering the payment obligation for the same transaction.

The idea is that the promissory note is supposed to be a way of isolating the payment obligation from the contractual matters that are the basis of the original transaction. If the seller is able to have the benefit isolated from the underlying contract, then this scheme can be of use to the seller – particularly if the benefit can be transferred to another party. Is the seller able to take the payment part of the transaction, isolate it from the delivery of the goods, and transfer the right to receive payment to an outside party who will be dealing solely with the financing situation?

The question of whether the outside party can have the benefit of the transaction and receive payment isolated from particular defenses is most intriguing. A real holder in due course should be able to enforce against the purchaser free of the defects in title and free of any contractual defenses.

Real Defences ⟶ Holder in Due Course ⟶ Defects in Title ⟶ Remote Holder ⟶ Personal Defences

Generally speaking, the mainstream in Canadian law places the contract defences in the lower category.

Financing Parties

The development of financing makes large purchases possible. Without the financing system available and without inexpensive financing, the development of large purchasing power would not work as well. For instance, if people were unable to purchase automobiles over time, how many automobiles would be sold? Having financing products available makes it more likely that expensive consumer goods will sell. Form the perspective of the consumer, it means that the seller can concentrate on his/her own expertise in the business – the seller does not have to concentrate about knowing about finances. The seller can deal with a financing agency that will make the method of selling the product feasible.

We are not talking about merchant-to-merchant transactions – this is not mercantile. Our main focus is the application of bills of exchange principles outside of the mercantile context in which they have developed and their application in consumer credit.

Monticello State Bank v. Kiloran (1921) SCC

Facts	Holding
○ The buyer of a horse gave the seller a couple of promissory notes ○ The horse died so that there was no actual transfer of the property ○ The seller assigned its rights to the bank and endorsed and delivered the promissory notes ○ The promissory notes were on the same piece of paper as the	○ **Trial**: trial judge ignored the notes ○ **Appeal**: The notes are good and enforceable ○ The only connection between these notes and the conditional sales agreement is that they are found on the same sheet of paper – but, they are distinctly and separately signed and by the expressed intention of the parties intended to be separate from the agreement ○ Some judges believe that the banks can enforce the notes because the promissory notes are severable ○ Other judges believe the notes are enforceable because of the particular cut-

conditional sales contract o As part of the conditional sale contract there was a cut-off clause – buyer understands that the promissory note can be discounted to some other outside party without prejudice of equity etc.,	off clause in the contract

There are two ways at looking at this case:

1. Ordinary promissory notes are severable and you move on to analyze whether the holder is a holder in due course; or,
2. Promissory notes are severable where the main contract has a cut-off clause explicitly alluding to severability

BEA Paragraph 16(3)(b) – Unqualified Order to Pay

> An order to pay out of a particular fund is not unconditional within the meaning of this section, except that an unqualified order to pay, with (b) a statement of the transaction that gives rise to the bill, is unconditional

Range v. Belvedere Finance (1969) SCC

Facts	Holding	Ratio
o There was an order for a fur coat, the seller went bankrupt and never delivered it o There had been a conditional sales contract and on the same form a promissory note – there was a perforated line separating the two of them o Belvedere finance took both an assignment of the conditional sales contract and the endorsement of the promissory note o When they took the note, they had no idea about the fur coat not being delivered	o The court holds that this promissory note was conditional – not unconditional like *Monticello* – there was no cut-off clause o The finance company cannot enforce the promissory note because the conditional sales contract did not have a cut-off clause o What was transferred was not an unconditional note – but rather a conditional sale contract and a note forming a whole	o A conditional sales contract is not a bill of exchange and you cannot get the protections of being a holder in due course o A cut-off clause in a conditional sales contract makes the promissory note unconditional, but without the cut-off the note is conditional

Always ensure that the conditional sales contract has a cut-off clause if you intend to make the promissory note unconditional and, thus, afford the holder all the protection of being a holder in due course.

Before there was a legislative response, there were a number of different judicial approaches.

Federal Discount v. St Pierre (1962) ON CA

Facts	Holding
o A promissory note for $273.30 o The purchaser bought a knitting machine with the idea of running a small business from her home o The purchaser would produce	o Unless the ultimate holder or some earlier holder has acquired the instrument in the course of such a transaction the earlier tainting circumstance survive and the holder seeking to enforce payment of it must, on the merits, meet any defence which would have been available to the maker

goods that would then be sold ○ The parties were a bit sloppy with the documents ○ The yarn-craft company went bankrupt and did not purchase any goods from the purchaser ○ The purchaser was not able to pay for the knitting machine ○ Federal discount is trying to enforce the promissory note ○ The defendant purchaser argues that yarn craft owes her $160	○ The relationship between the seller and the finance company was not that of just endorser and endorsee of a promissory note – they were much more connected – they were ordinarily engaged in one business, each to a particular phase of the business ○ The course of dealings between the plaintiff and the officers indicates a relationship much more intimate than that of endorsee or endorser in a normal commercial transaction ○ The claim was accepted because the bankrupt and the purchaser were all part of one business ○ **Ratio**: The close-connectedness doctrine operates where the parties are so closely connected that they are deemed as engaged in one business

Close Connectedness Doctrine – where the parties are so closely connected that they are deemed as engaged in one business. In the event that parties are engaged in one business, set-off's etc., are available to the financing company. If the close connectedness doctrine is going to apply, how much of the underlying circumstances will the financial institution require to be separate?

Bank of Montreal v. Kon (1978) AB SC

Facts	Holding
○ Maple Leaf was the payee of promissory notes ○ The bank financed Maple Leaf's purchase of the motor homes which were sold to customers ○ Upon sale, Maple Leaf kept possession of the motor homes while the customers (Kon) would allow Maple Leaf to rent out the homes during this time in order to assist in payment – once paid, the motor homes would be delivered to the customer ○ Not enough money was coming from the rentals and Maple Leaf went out of business – went into receivership and sold off the motor homes ○ The proceeds from the motor homes was insufficient so the bank sought to enforce ○ Kon argued that there was such a close connection between the bank and Maple Leaf that the close connectedness doctrine ought to apply: the bank had knowledge of the underlying transaction	○ *Issue*: Can the close-connectedness doctrine apply in a direct loan situation? ○ Purchasers are trying to argue that *Federal Discount* should apply ○ There was no evidence that the bank ought to have known about any wrong-doing ○ All of the purchasers had financed the sales of the motor homes with the Bank of Montreal

A direct loan is one where the consumer approaches the financial institution for a specific sum to be spent on specific items. The financial institution may take a security interest over the items being bought.

The *Bills of Exchange Act* tries to cut back on negotiability for both situations: the financing institution is going to be subject to the underlying equities as a:

1. Seller of finance
2. Direct loan finance

Part V of the *Act* provides provisions relating to consumer bills and notes. Section 188 provides a number

BEA Section 188 – Consumer Purchase

> "consumer purchase" means a purchase, other than a cash purchase, of goods or services or an agreement to purchase goods or services
> (a) by an individual other than for resale or for use in the course of his business, profession or calling, and,
> (b) from a person who is engaged in the business of selling or providing those goods or services

BEA Section 190 – Consumer Purchase

> **190.** Every consumer bill or consumer note shall be prominently and legibly marked on its face with the words "Consumer Purchase" before or at the time when the instrument is signed by the purchaser or by any person signing to accommodate the purchaser

Royal Bank v. Siemens (1978) BC Co. Ct.

Facts	Holding	Ratio
○ A joint promissory note was given to the Royal Bank – the money was lent to purchase a car ○ Two cars were subject to chattel mortgages on the promissory note ○ One individual left with his car and the other was left holding note ○ Another promissory note was issued with a chattel mortgage on her car only ○ Neither note say 'consumer purchase' across the front ○ She is having trouble making the payments, lawyer advised her to stop paying because it did not say 'consumer purchase'	○ Part V of the *Bills of Exchange Act* cannot be used against the bank in this case ○ The court looked to the definition of 'consumer purchase' – this is not a consumer purchase because this is a cash purchase (the seller was completely paid) ○ A cash purchase does not come within the definition provided in section 188	○ A consumer loan is never considered a consumer purchase where the money is taken to pay off the seller completely

This case subverts the whole point of having Part V apply to the direct loan situation. Section 189(3) cannot mean anything in this case. How could you have a consumer purchase in the direct-loan situation?

Subsection 189(3) – Direct Loans

> **189(3).** Without limiting or restricting the circumstances in which, for the purposes of this Part, a bill of exchange or a promissory note shall be considered to be issued in respect of a consumer purchase, a bill of exchange or a promissory note shall be conclusively presumed to be so issued if,
>
> (a) the consideration for its issue was the lending or advancing of money or other valuable security by a person other than the seller, in order to enable the purchaser to make the consumer purchase; and
> (b) the seller and the person who lent or advanced the money or other valuable security were, at the time the bill or note was issued, not dealing with each other at arm's length within the meaning of the Income Tax Act.

You might say that if the financing company is only loaning enough for the down payment, then the direct loan situation might cover it. What is meant by 'other than a cash purchase'? If the entire amount is paid to the seller, perhaps that is a cash purchase. Be wary of the two situations:

1. Sales finance from the seller and transfer of the promissory note; and,
2. Direct finance

The Cheque System

The cheque is a system of ordinary payment – we expect the bank to accept and clear a cheque and everything will work out nicely. For the system to work each of the branches of the same bank are treated as separate entities. There are problems trying to sort out the role of the banks when things do not work.

Bank of Nova Scotia v. Sharp (1975) BC CA

Facts	Holding
○ Sharp deposited a cheque to his account with the Bank of Nova Scotia in Nanaimo ○ The cheque was sent to the drawer's bank, the Bank of Nova Scotia, in Langley ○ Sharp endorsed the cheque and it was credited to his account ○ The cheque is sent back by the drawer's branch as N.S.F. ○ Nanaimo sends it back in contemplation of the drawer providing the funds ○ In the mean time Sharpe has used the money and the drawer has gone bankrupt ○ Bank takes money out of Sharp's account, which is now overdrawn ○ Sharp argues that it is the bank's fault that he lost the amount of the cheque	○ The collecting bank is entitled to the amount of the overdraft ○ The moment the branch finds out about the dishonor s/he must notify immediately – notice of dishonor ○ If a holder does not give notice of dishonor when s/he is supposed to, s/he cannot enforce ○ The bank, however, is not acting as a holder, but instead as an agent ○ Sharp could not prove that he had actually suffered any damage as a result

When the cheque has been drawn by the drawer on the drawee bank to a payee, there is a question about whether the collecting bank is acting as an agent for its customer by sending a cheque through the clearing system or whether it is acting as a separate holder. If the bank is acting as a separate holder it could use any of the remedies available to any holder of a bill of exchange. A holder of the bill is supposed to be able to enforce it against any previous endorser and the drawer – thus, if the bill is not paid by the drawee the holder is entitled to collect by any previous endorser or drawer.

BEA Subsection 165(3) – Bank as Holder in Due Course

> **165.(3)** Where a cheque is delivered to a bank for deposit to the credit of a person and the bank credits him with the amount of the cheque, the bank acquires all the rights and powers of a holder in due course of the cheque.

Section 165(3) provides that where a cheque is delivered for a credit of a person and the bank credits the person with the amount of the cheque, the bank acquires all the rights of a holder in due course of the cheque. In other words, so long as the bank credits the customer with the amount of the cheque, the bank will be considered a holder in due course. However, what is meant by 'credits him with the amount of the cheque'? This section was adopted to reverse the result of the following case from Alberta.

Facts	Holding
○ A cheque was restrictively endorsed on the back ○ The collecting bank did not notice the restrictive endorsement	○ When you have a restrictive endorsement the cheque is no longer a negotiable instrument – you cannot become the holder in due course unless the instrument is negotiable ○ It was argued that it would not be fair or efficient for the banking industry to have to check and cheque for restrictions every time

The provision appears to operate more broadly than creating a holder in due course – it appears to say that all the bank has to do is credit the bank account before it will be considered a holder in due course. If there is no endorsement on the back of a cheque (for instance, one deposited in an ABM) the bank can argue that it has the right to provide the endorsement because it acts as an agent for the customer. In accepting unendorsed cheques from a customer for deposit, the 'usual banking practice' of a depository bank is for the teller to endorse the name of the customer on the cheque. "In so doing, the bank … (is) acting as agent for its customer" (*Keyes* v. *Royal Bank of Canada* (1947) SCC).

Thus, section 165(3) would provide the legislative cover for a bank to take a cheque, send it through the clearing system, and still claim holder in due course status if something goes wrong. This status may be useful if it wants to get money back from it own customer, but more than that the collecting bank can taken an action against the drawer.

BEA Section 99 – Notice of Dishonour by Agent

> **99.(1)** Where a bill when dishonoured is in the hands of an agent, he may himself give notice to the parties liable on the bill, or he may give notice to his principal, in which case the principal on receipt of the notice has the same time for giving notice as if the agent had been an independent holder.

BEA Subsection 96(a) – Time for Notice of Dishonour

> **96**. Notice of dishonour in order to be valid and effectual must be given
> (a) not later than the juridical or business day next following the dishonouring of the bill

National Slag v. CIBC (1983) ON HC

Facts	Holding
○ The cheque came back to the bank ○ The cheque arrives on a Monday with the drawee bank ○ On Friday the drawee bank decided to call in all the loans on the drawer ○ The drawee took some time in getting a receiver and did not send it back right away (Banker's Ass.) ○ Payee was trying to argue on the rules of the Banker's Assoc. – notice ought to have been given within the day ○ Appellant argues that the collecting bank should not have received the cheque back two days late	○ While the Bank of Montreal breached the Clearing House Rules, it was not in any breach of duty owed to the appellant ○ The one day's delay caused the appellant no damage, nor did it turn a worthless cheque into a good one ○ The relationship between the bank and the appellant is defined by their account agreement ○ The agreement entitled the CIBC to debit the appellant's account, even though the cheque was returned in a manner not in accord with the Clearing House Rules

CIBC v. May Trucking (1984) BC CA

Facts	Holding
○ The payee took a cheque into the CIBC branch in Hope, BC and requesting that the monies are deposited in the payee's account at William's Lake, BC on July 12 ○ The next day the drawer put a stop-payment order on the cheque ○ The collecting bank had already credited the account of the payee ○ Collecting bank is going after the drawer	○ *Issue*: Did the CIBC have the status of holder in due course under 165(3) ○ The stop payment order is only as between the drawer and the drawing bank ○ Prior to the time of the stop-payment, the collecting bank had acquire the status of a holder in due course ○ The holder in due course can go after the drawer for the amount of the cheque ○ It is enough to have a single credit entry

Section 165(3) clearly works to the benefit of a collecting bank enforceable over any prior secondary party. A stop-payment only works if you are not worried about a collecting bank somewhere down the line crediting the account and acting as a holder in due course.

TD Bank v. Jordan (1985) BC CA

Facts	Holding	Ratio
○ Not Done	○ There was no problem with good faith in the collecting bank ○ *Issue*: Had there been a crediting of the customers account under 165(3)? ○ Does the debtor's account have to be debited in order for the creditor's account to be credited? ○ All you have to have is the internal documentation saying that the money has been put into the person's account	○ The collecting bank meets section 165(3) through documentary evidence that the customer's account is credited without a hold so long as the bank is acting in good faith

Good faith for a holder in due course is supposed to be subjective – you can be negligent and still be in good faith. On appeal it was held that the bank manager was not in good faith and the decision was reversed on its facts. The BC CA reads in another requirement under 165(3): it is not just crediting the customer's account that is required, but you also have to be in good faith.

Forgery

Statutory Scheme – 48 versus 20(5)

In sales finance we are concerned with the parties on the instrument itself – the potential liability of the drawer or endorser. In terms of liability, forgery is a real defence that beats even a holder in due course. The holder in due course is able to take free and clear from a number of equities as to liability on the bill that go along with title. The equitable defences can generally be used against other parties except for the holder in due course. In some instances, the holder in due course will be able to defeat equitable defences that go with a valid instrument or note.

In the case where the instrument is not properly issued, such as where there is a forgery, there is no valid instrument. In this way we have a *real* defense. A real defense applies where you do not have a real negotiable instrument. If the drawer's signature is forged then there is no real negotiable instrument and the drawer cannot be made liable on it – it is the act of the signature that leads to liability. Once cannot be held liable if s/he has not signed. In terms of subsequent endorsements, if the instrument is later forged the forged signature is to be inoperative.

BEA Section 48 – Forgery

> **48.** If a signature is forged or placed thereon without authority then the forger's unauthorized signature is wholly inoperative and there is no right to enforce payment and there is no right that can be enforced against any party unless the party is precluded from setting up the forgery or the one with the authority to preclude

Thus, unless the defendant is precluded from setting up the real defence, the defence will be available. In section 48(3) we have a specific provision referring to cheques:

> **48.(3)** Where a cheque payable to order is payable y the drawee on a forged endorsement out of the funds of the drawer, or is so paid and charged to the account, the drawer has no right of action against the drawee for the recovery of the amount so paid, nor any defence to any claim made by the drawee for the amount so paid, as the case may be, unless he fives notice in writing of the forgery to the drawee within one year after he has acquired notice of the forgery

If you have not signed or if the endorsement is forged then you have a real defense. The possessor of the bill with a forged signature is not entitled to receive payment through the ordinary system. If there is a payment out to an unauthorized person there are tort actions that may be drawn from the common law that make the converting party liable. The conversion action is a way of going after one of the banks in the payment clearing system if they have paid out when they should not.

BEA Subsection 20(5) – Fictitious Payee

Consider also section 20 of the *Bills of Exchange Act* where we are talking about the identification of the parties and the definition of the negotiable bill. Section 20(5) is the relevant provision:

> **20.(5)** Where the payee is a fictitious or non-existing person, the bill may be treated as payable to the bearer

It would be extremely difficult to get a fictitious or non-existing person to endorse and, thus, you can treat the instrument as the bearer of the bill. The drawer has issued a valid negotiable instrument, but the

payee named is a non-existing or fictitious person – because the person will not be able to endorse you treat it as a bearer bill. Anyone dealing with a bearer bill has the authority to deal with it – it is the drawer's fault for making the mistake and s/he should be held liable (made to bear the risk).

The banks would like things to be within section 20(5). From the perspective of the company trying to get its money back, they do not want 20(5) applied – they will want to get their money back to say that the bank has paid out on a forged endorsement.

Should it be the banks that guard against possible forgeries or, on the other hand, can section 20(5) be applied creating a responsibility on the drawer?

Royal Bank v. Concrete Column Clamps (1977) SCC

Facts	Holding
○ The fraud is that of a payroll clerk who is not a signing officer ○ The clerk is able to present a number of cheques with non-existing persons and former employees who are not entitled to payment during the period ○ Clerk processed cheques through the system and the signing officer signs – clerk cashes the 'special' cheques at the collecting bank ○ Conflict is between the drawer and the drawee bank	○ *Issue*: Who is going to be liable as between the drawee bank and the drawer (Royal bank and Concrete Columns)? ○ Concrete argues they were forged endorsements ○ Royal bank argues fictitious non-existing persons ○ Cheques payable to totally fictitious names were the liability of Concrete Column – drawer assumes the risk and liability ○ Where the nature of the business involves employee roll-over, then it might be difficult for the company to detect improper payees ○ *Majority*: These were forged endorsements and the fraudulent clerk forged the endorsements – the drawee bank is liable and has no defense as the payee's were neither fictitious nor non-existing ○ Liability should remain on the bank in this kind of situation because there can be large volumes of cheques that can be mechanically signed when the employer does not know the employees reasonable ○ In an age when cheques are processed by computer, it is even more necessary to avoid facilitating fraudulent operations ○ **Ratio**: Unless the payee is fictitious or non-existing, liability on a forged document will remain with the bank

In a forged endorsement problem, all of the difficulty for the fraudulent payment is taken off the company. Should the company have been able to control to some extent and, therefore, should the company not be liable for the fraud of its own employees?

Concrete Columns would probably have been held liable if the signing officer were the fraudulent party – the bank will escape liability if it is shown that the drawer or signing officer knew of the fraud when issuing or signing the cheques. The drawer is implicated where the fraud is that of the authorized signer. In the meaning of 20(5) the intent of the drawer is crucial. Where the drawer makes the payee fictitious the analysis is subjective. Where the drawer makes the payee non-existent, the test is objective. Therefore, if the drawer is involved in the trickery the drawer will be held liable.

Laskin would have palced the risk on Concrete Column based on an agency analysis. Laskin believes that this was something where the responsibility should have been placed on the company and the employer should have been held vicariously liable for the fraud of the clerk – it should not make any difference whether it is the payroll clerk who is trusted to draw up the list or the officer who is trusted to sign.

The case law on fictitious or non-existing payees is as follows:

> In the case of a bill drawn by Adam Bebe upon John Alden payable to Martin Chuzzlewit, the payee may or may not be fictitious or non-existing according to the circumstances:
> (1) If Martin Chuzzlewit is not the name of any real person known to Bebe, but is merely of a creature of the imagination, the payee is non-existing, and is probably also fictitious.
> (2) If Bebe for some purpose of his own inserts as payee the name of Martic Chuzzlewit, a real person who was known to him but whom he knows to be dead, the payee is non-existing, but is not fictitious.
> (3) If Martic Chuzzlewit is the name of a real person known to Bebe, but Bebe names him as payee by way of pretence, not intending that he should receive payment, the payee is fictitious, but is not non-existing.
> (4) If Martin Chuzzlewit is the name of a real person, intended by Bebe to receive payment, the payee is neither fictitious nor non-existing, notwithstanding that Bebe has been induced to draw the bill by the fraud of some other person who has falsely represented to Bebe that there is a transaction in respect of which Chuzzlewit is entitled to the sum mentioned in the bill

Fok Cheong Shing v. Bank of Nova Scotia (1981) ON CA

Facts	Holding
○ The signing officer was fraudulent	○ If the fraud is the fraud of the person who signs, the fraud will be attributed to the drawer ○ It is the intent of the drawer and the signing officer that meant that these were cheques within section 20(5) ○ **Ratio**: The intent of the signing officer may implicate the drawer

Boma Manufacturing v. CIBC (2001) SCC

Facts	Holding
○ Boma manufacturing alleges that CIBC has dealt improperly with Boma's cheques ○ CIBC argues it was a holder in due course and entitled to pay out by virtue of 20(5) and 165(3) ○ The signing officer was fraudulent in a small company with two principals and one signor ○ The signing officer is only supposed to sign when neither owner is around – she wrote a number of cheques and managed to collect a lot of money ○ CIBC collected the cheques ○ 107 cheques were not endorsed – these were made out to J.R. Lam or J. Lam – a supplier of the company – in an attempt to mimic her husband, J.R. Alm ○ CIBC deposited the money into her husband's account ○ CIBC thought that she owned the company and assumed the cheques were to be payable to J.R. Alm	○ On the previous authority we would have said that the fraud of the signing officer should have been attributed to Boma – the fraudulent intent of the person signing gets us into category 3 – fictitious payee ○ The signing officer was acting outside the scope of her authority ○ *Issue*: Who represents the drawer's intent? ○ The real intent for Boma is the intent from the two principal officers who did not know about this ○ These are not fictitious payees, but problems of forged endorsements or conversion ○ The banks cannot use 165(3) to help itself – where a cheque is delivered for deposit and the bank credits to the credit of the person, the bank acquires all the rights and powers of a holder in due course ○ Section 165(3) requires a deposit into the account of the real payee or legitimate endorsee of the cheque ○ Section 39 provides that delivery must be made to an authorized or legitimate person ○ **Dissent**: There is no authority for the position adopted by the majority

Iacobucci took the *Concrete Columns* finding and applied it in the case of a fraudulent signing officer.

The likelihood of fraud is high when someone presents a third-party cheque, particularly when it has no endorsement. This is a situation that encourages fraud and, thus, we will consider the collecting bank to be negligent. It appears that all of the responsibility has been put on the banks and the company has been absolved of all responsibility to control their employees. This is the opposite result of the obligations and responsibility in the *Uniform Commercial Code*. The sections to keep in mind are section 48(1) on forgeries and section 20(5) on the fictitious payee.

What happens when you have a payee who is not a real person – how can this payee possibly endorse? The *Act* provides that if the payee is a non-existing person you treat the instrument as a bearer bill – Both for a non-existing payee and also for a fictitious payee. The question turns on what we mean by non-existing and fictitious. The policy of the majority decision in *Boma* speaks to the responsibility of the collecting bank to get endorsements of any third party cheques deposited into the account of the customer. The collecting bank was not dealing with what it thought were third-party cheques. From a policy perspective, if you have a fraudulent third-party like Alm, can she not simply go away and forge the document – the bank will still be liable. The bank has nothing to verify the signature against when it is dealing with a third-party.

Boma has expanded the space available to the company and places liability on the banks. The only way the bank can win is to argue successfully that these are bearer bills. Previously we thought it was the intent of the signor as an indicator as to whether we have a fictitious payee situation. However, the guiding mind of the corporation did not intend for the signing officer to commit the fraud.

Arrow Transfer v. Royal Bank of Canada (1972) SCC

Facts	Holding
○ There was a dispute between the drawer and the drawee bank ○ Forged cheques had been paid out over a period of five years – a number of them had gone through the Bank of Montreal ○ When Arrow found out about this it is reminded of its verification agreement – supposed to give notice within 30 days after receiving the relevant documents	○ Normally the Royal Bank would be liable because it is supposed to know the signatures of its customers ○ However, the verification agreement provides that the Royal Bank is precluded from complaining about a forgery on everything outside the 30 day limit ○ The verification does not leave out forged drawer's signatures ○ **Dissent**: If such a duty is going to be imposed on a customer, then it should be made absolutely clear in the contract – if the clause is vague it should be interpreted *contra preferentum* (as against the person to whom the benefit is to enure) ○ Ratio: A verification agreement may set up a contractual preclusion under section 48 applicable against an application of section 20(5)

Does a customer have any duty to the bank to avoid general negligence? There is little common law duty on the customer to avoid negligence. What is meant by preclusion in section 48 – a forgery is inoperative unless the customer is precluded from complaining. There are some ways in which you can be held liable on the basis of negligence:

1. A contractual obligation – preclusion by contract; and/or
2. Drawing the cheque so that it leaves another the opportunity to increase the amount

CP Hotels v. Bank of Montreal (1981) SCC

Facts	Holding
○ Forged signature	○ The customer had no duty of care to examine the signature ○ The duty of care as a drawer is simply to ensure there is not room to alter the amount on the cheque

Holder in Due Course Problems

Step One – B.O.E. Requirements

Ensure that the instrument in question qualifies as a 'bill of exchange':

BEA Subsection 16(1):

A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or on a fixed future determinable time, a sum certain in money to or to the order of a specified person or to bearer

1. "*Unconditional* order"	○ *BEA Section 17(1)* – (58) An instrument expressed to be payable on a *contingency* is not a bill – the happening of the event *does not cure* the defect ○ *BEA Section 20(1)* – (58) A bill containing *words prohibiting transfer* is not negotiable ○ *BEA Section 16(3)* – (70) An order to pay out of a particular fund is not unconditional, except that an unqualified order to pay *coupled with* (a) an indication of a particular fund the drawee can reimburse himself from or (b) a statement of the transaction that gives rise to the bill, is unconditional ○ *CIBC* v. *Morgan* (59) – The *possibility* of a contingency arising makes the bill conditional ○ *Monticello State Bank* (69) – A note given by the maker with a conditional sales contract will only be considered negotiable if it *clearly* severable ○ *Range v. Belvedere Finance* (70) – In the absence of a *cut-off clause* with the conditional sales contract, the note will be considered conditional
2. "In Writing"	○ The bill must be in *writing* ○ *BEA Section 63* (59) – Misspelt Name is alright ○ Where words and figures do not correspond, the words will be paramount
3. "Requiring the person to whom it is addressed to pay a *sum certain*"	○ *BEA Section 27(1)* – (59) Although required to pay these ways (a-d), a sum is a sum certain within the meaning of this *Act* ○ *CIBC* v. *Morgan* (59) – Authority given that may extend beyond the bill to another security is not a sum certain; an acceleration clause requiring full payment on default is not a sum certain (what amount will that 'full payment' be?)

Section 16(2) – Non-Compliance with Requisites

An instrument that does not comply with the requirements of subsection (1), or that orders any act to be done in addition to the payment of money, is not, except as hereinafter provided, a bill of exchange

Take a glance at 57-59

Step Two – Determine Rights and Powers of Holder (Status)

Determine what the rights and powers of the particular holder are, which will depend on his/her status: (holder, holder not in due course/remote holder, subsequent holder or holder in due course)

BEA Subsection 55(1):

> A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely,
> (a) that he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact; and,
> (b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it

1. "A holder in due course is a holder"	○ *BEA Section 2* – A 'holder' means the payee or endorsee of a bill or note who is in possession of it ○ *Aldercrest* (65) – the possessor of the note never becomes a holder without it being endorsed
2. "Who has taken a bill, complete and regular on the face of it"	○ *BEA Section 144* – Material alteration – Where a bill is materially altered with the assent of the parties liable, the bill is voided, **but** (2) where the alteration is not apparent, the holder in due course may avail himself of it
3. "Before it was overdue"	○ *BEA Section 69(1)* – Where an overdue bill is negotiated, it can be negotiated only subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than the person from whom he took it had
4. "Without notice that it had been dishonoured"	○ *BEA Section 71* – Where a bill has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title
5. "He took the bill in good faith"	○ *BEA Section 3* – A thing is deemed to be done in good faith, within the meaning of this *Act*, where is it in fact done honestly, whether it is done negligently or not ○ *TD Bank* v. *CAC* (67) – you can be negligent, careless, and blundering and still be a holder in due course, the question will turn on whether you've acted honestly – subjective test – is it really done honestly ○ *Federal Discount* (70) – the close-connectedness doctrine may operate where the parties are so closely connected that they are deemed as engaged in one business ○ *BOM* v. *Kon* (70) – qualification on close-connectedness – there must be evidence that the financier ought to have known about some wrong-doing or bad faith etc.,
6. "He took the bill for value"	○ *BEA Section 2* – 'value' means valuable consideration ○ *BEA Section 52(1)(a)* – valuable consideration is any consideration sufficient to support a simple contract ○ *BEA Section 53(1)* – where at any time value has been given for a bill, the holder is deemed to be a holder for value as regards all parties liable to the bill ○ (65) When you receive something as a gift you step into the shoes of the donor – the giftee cannot defeat any previous interest even if takes without notice. A person cannot gift more than s/he has – *qualification* – gift from H.D.C. – *S.56*
7. "At the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it"	○ *BEA Section 55(2)* – title in the bill is defecting when obtained by fraud, duress, force, fear, unlawful means, negotiated for an illegal consideration, where there is a breach of faith, or circumstances that amount to fraud ○ The holder in due course cannot have had any notice of these defects ○ *Whistler* v. *Forster* (64) – A holder of a bill must obtain endorsement of it before notice of any fraud, otherwise s/he will be considered an assignee of an ordinary chose in action without the possibility of acquiring better title

If **holder** – 73(a); if **H.D.C.** – 73(b); if **subsequent holder** – 73(b); if **remote or holder not in due course** – 73(a)

Step Three – Has the Holder Preserved Liability?

A. Determine Who is Liable on the Bill

BEA Section 130 – Liability Only When Signed (61)

BEA Section 129(a) – Liability of Drawer (60)

BEA Section 132(a) – Liability of Endorser (60)

BEA Section 51(1) – Signing as Representative (65)

> *Allprint Co. v. Erwin* (65) – where there is only one signature on the corporate cheque and it is ambigious as to whether or not personal liability ought to be exempted, extrinsic evidence may be led – where more than one signature you get liability of corporation plus personal liability of all signors

B. Preserving Liability on the Bill

The holder of a bill must observe various formalities in order to preserve rights as against 'secondary parties' (drawer and endorsers). The holder must have *presented* the bill. Where the instrument is presented and the acceptance or payment is refused, the holder must give notice of dishonour to the drawer of the bill and each endorser of the bill by the next juridical day.

BEA Section 95(1) – Notice of Dishonor (62)

BEA Section 96(a) – Time for Notice (Next Day) 74

BEA Section 98(2) – Notice can be written or oral

Step Four – Priority of Interests

1. Real Defenses	○ *BEA Section 48* – Forgery ○ *BEA Section 138* – Discharge by Payment
2. Holder in Due Course	○ *BEA Section 73(b)*
3. Defects in Title	○ BEA Section 55(2)
4. Remote Holder or Holder Not in Due Course	○ *BEA Section 73(a)* – just a holder
5. Mere Personal Defences	○ Problems with the underlying contract etc., ○ *James Lamont* (66) – a total failure of consideration in the underlying contract *may* attach to the bill as a defect, but not likely – the lack of consideration in the underlying contract will not be set-off against the amount owing on a bill ○ *Staiman Steel* – the equitable set-off defence is not available against the bill of exchange

Note: The standard view in regards to the consideration defenses is that they are mere personal defenses that cannot be asserted against the bill itself. The H.D.C. will never be affected, the question centers on whether or not the remote holder or holder not in due course will be subject to or defeat the defence. If you can characterize the consideration deficiency in the contract as amounting to fraud, then the deficiency may clearly be elevated to the status of a defect in title. A defect in title – 55(2) – can be asserted against the remote holder.